Supreme Court, U.S.
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No. ____

In the

# Supreme Court of the United States

JOSHUA HALE; JOSEPH HALE; and ELISHABA HALE,

*Petitioners,*

v.

DIRK KEMPTHORNE, Secretary of the United States Department of Interior; WILL TIPTON, Acting Superintendent, Wrangell-St. Elias National Park & Preserve; MARSHALL NEECK, Chief Ranger, Wrangell-St. Elias National Park & Preserve; DEPARTMENT OF THE INTERIOR; NATIONAL PARK SERVICE; FRAN MAINELLA, Director of the National Park Service; MARCIA BLASZAK, Regional Director of the National Park Service, all in their official capacities; NATIONAL PARKS CONSERVATION ASSOCIATION; THE WILDERNESS SOCIETY; and ALASKA CENTER FOR THE ENVIRONMENT,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

JAMES S. BURLING
*Counsel of Record*
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
*Counsel for Petitioners*

## QUESTIONS PRESENTED

Petitioners seek adequate and feasible access to their homestead via an established right-of-way within the Wrangell-St. Elias National Park and Preserve (Park). In the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3170(b), Congress directed that, "[n]otwithstanding any other provisions of this Act or other law," the Respondents (Park Service) "shall" allow landowners "such rights as may be necessary to assure adequate and feasible access" across conservation lands. The questions presented are:

1. Does the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, allow the Park Service to deny "adequate and feasible access" to privately owned land when ANILCA expressly mandates that the Park Service cannot deny "adequate and feasible access" "notwithstanding any other . . . law?"

2. Is normal use and routine maintenance of a state-owned right-of-way subject to federal approval and regulation?

3. May an appellate court base a decision on factual determinations that were not reached by the trial court before it mistakenly dismissed the case on jurisdictional grounds?

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners (Hales) hereby state they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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## PETITION FOR WRIT OF CERTIORARI

Joshua Hale, Joseph Hale, and Elishaba Hale (Hales) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1]

## OPINIONS BELOW

The Hales filed this action in the district court on November 4, 2003. The Hales sought declaratory and injunctive relief pursuant to Alaska National Interest and Lands Conservation Act (ANILCA), 16 U.S.C. § 3101, *et seq.*, and former Revised Statute (R.S.) 2477 concerning the Park Service's authority to prohibit the Hales from accessing their property via overland motorized means, other than by snow machine in winter.

The Ninth Circuit Court of Appeals' initial opinion is reported at *Hale v. Norton* (*Hale I*), 437 F.3d 892 (9th Cir. 2006), and is reproduced herein at Appendix (App.) C. The Ninth Circuit's subsequent opinion, denying the Hales' Petition for Rehearing and Petition for Rehearing *En Banc* and withdrawing and replacing its previous decision is reported at *Hale v. Norton* (*Hale II*), 461 F.3d 1092 (9th Cir. 2006), and is reproduced herein at App. B.

On October 2, 2006, the Ninth Circuit ordered the parties to submit simultaneous briefing concerning whether the court should rehear the case *en banc*. The Court did not rehear the case, but on February 5, 2007, the Ninth Circuit withdrew and

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[1] Joseph Hale and Elishaba Hale changed their names from Nava S. Sunstar and Butterfly Sunstar, respectively, during the course of this litigation. These name changes were approved by the Alaska state trial court, Case Nos. 3PA-05-02040 CI and 3PA-07-00958 CI, respectively.

replaced its August 25, 2006, opinion, issuing a third decision, *Hale III*, reproduced in App. A. *Hale v. Norton* (*Hale III*), 476 F.3d 694 (9th Cir. 2007). This revised decision was based, in part, on new findings on disputed factual issues that had not been reached by the trial court, had not been the subject of any evidentiary hearings, and had not been established as a prerequisite to any summary judgment motion (there was no such motion).

The district court's opinion denying declaratory and injunctive relief is included herein at App. D. The district court's opinion denying the Hales' Motion for Reconsideration is included herein at App. E.

The permit the Park Service offered the Hales is reproduced herein at App. F.

## JURISDICTION

This case was filed in the United States District Court for the District of Alaska. The statutory basis for the district court's jurisdiction was 28 U.S.C. § 1331, due to the presence of a federal question, and 28 U.S.C. § 2201 (declaratory relief). This Court possesses jurisdiction pursuant to 28 U.S.C. § 1254.

## STATUTORY PROVISIONS AT ISSUE

The Alaska National Interest and Lands Conservation Act (ANILCA) provides in pertinent part:

> Notwithstanding any other provision of this Act or other law, in any case in which . . . privately owned land . . . is within . . . one or more conservation system units . . . the . . . private owner . . . shall be given . . . such rights as may be necessary to assure adequate and feasible access for

> economic and other purposes to the concerned land by such . . . private owner . . . . Such rights shall be subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands.

16 U.S.C. § 3170(b).

R.S. 2477, Rights-Of-Way and Other Easements in Public Lands, Mining Act of 1866, 43 U.S.C. § 932. Act repealed by the Federal Land Policy and Management Act (FLPMA) on October 21, 1976 (Pub. L. No. 94-579, sec. 706(a), 90 Stat. 2744, 2793) preserving valid rights-of-ways existing under 43 U.S.C. § 932 at the date of its approval. 43 U.S.C. § 1701, note. R.S. 2477 provides in entirety:

> The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

43 U.S.C. § 932.

The National Environmental Policy Act (NEPA) provides in pertinent part:

> The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal government shall—
>
> . . . .
>
> (C) include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,

> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332.

## STATEMENT OF THE CASE

ANILCA was the product of an intense congressional battle. To overcome opposition from a majority of Alaska's citizens, Congress included certain provisions specifically designed to address Alaskans' concerns of use and access. *See, e.g.*, 16 U.S.C. § 3170(b). This congressional compromise provided the public with tens of millions of acres of new parks, yet Congress also afforded Alaskans unique and special rules enabling continued use and access to private property within these vast new parks. ANILCA guaranteed that Alaskans shall retain the rights necessary to secure adequate and feasible access, subject only to reasonable regulation.

The Hales accept that under ANILCA the Park Service may *reasonably* regulate their access. Indeed, Congress provided the Park Service with authority in ANILCA "to protect the natural and other values" of the Park. 16 U.S.C. § 3170(b). But the Hales contend that, in exercising its authority to protect the Park's values, the Park Service must

also uphold the promise of access Congress deemed so important and, thus, may not deny adequate and feasible access. The Park Service denied the Hales adequate and feasible access by requiring a NEPA environmental review, subjecting their right of access to unreasonable regulation. The Park Service's regulation of the Hales' access violated ANILCA's access guarantee, exceeded its ANILCA authority to protect Park values, and constitutes *per se* unreasonable regulation.

## A. Factual Background

The Hales own land within the Park.[2] Their inholding lies approximately 13 miles from McCarthy, Alaska, and is accessible by a single road, the McCarthy-Green Butte Road (Road), which crosses the Park.[3] During the spring and summer of 2002, after purchasing the property, the Hales used and maintained the Road without incident, using motorized vehicles when necessary.[4]

In April, 2003, the Hales' home burned to the ground, destroying practically everything the Hales owned.[5] After the Hales' home burned, they attempted to travel the Road in order to obtain urgently needed supplies and building materials.[6] To transport the large and cumbersome materials needed to rebuild their home and supply their needs, the Hales required the use of a motorized, tracked vehicle, a bulldozer, with its blade up, to

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[2] App. A at A-3.

[3] *Id.*

[4] App. D at D-3.

[5] App. A at A-3.

[6] App. D at D-3 and A at A-3.

pull the loaded 16-foot trailer over the mountainous road.[7] However, the Park Service posted a public notice permanently prohibiting use of motorized vehicles on the Road, other than snow machines in winter, thereby preventing the Hales' use of their motorized vehicle to obtain their needed supplies.[8]

The Park Service then informed the Hales they needed a one-time permit for motorized access of the Road.[9] After securing temporary shelter, the Hales began trying in July, 2003, to obtain the permit from the Park Service.[10] The Hales requested a permit on an expedited basis as the Road, even via motorized, tracked vehicle, becomes treacherous during the winter.[11]

The Park Service did not cooperate in allowing the Hales adequate and feasible access.[12] Instead, the Park Service decided that before issuing a permit decision, it must conduct an environmental review pursuant to NEPA, issue a formal environmental assessment (analysis), and publish it for public comment.[13] With the window of safe and feasible access closing, the Hales urgently sought an emergency permit in September, 2003.[14] But on September 29, 2003, then on October 2, 2003, and again on October 29, 2003, the Park

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[7] App. F at F-2.

[8] App. D. at D-3 and A at A-3.

[9] App. A at A-3.

[10] *Id.*

[11] *Id.*

[12] *Id.* at A-3, 4.

[13] *Id.* at A-4.

[14] *Id.* at A-3.

Service refused to allow adequate and feasible access because the Hale's situation did not fall into NEPA's emergency exceptions and they refused the Hales access without a permit.[15]

The Park Service claimed it could complete its NEPA analysis and issue a permit decision in nine weeks.[16] However, the Park Service released the results of its NEPA analysis five months after the Hales first sought a permit, and did not issue a permit until almost an additional three months later.[17] The Park Service offered a temporary, one-time permit valid for one year only valid between March 12, 2004, to April 15, 2004, and from October 20, 2004, to March 12, 2005, and only for 18 one-way trips using a tracked vehicle pulling a trailer.[18] Otherwise the Park Service allowed access only by air, foot, and horseback in the summer, and snowmachine in the winter when the ground was frozen.[19]

The Hales did not accept the permit offer because it did not provide adequate and feasible access.[20] Under the Park Service's interpretation of its authority, a second attempt to obtain adequate and feasible access will require the Hales to (1) apply for another permit; (2) await another NEPA analysis; and (3) again submit to unreasonable conditions that prevent adequate and feasible access.

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[15] App. A at A-4.

[16] *Id.*

[17] App. F.

[18] *Id.* at F-1, 5.

[19] *Id.* at F-4.

[20] *Id.* at F-4 to F-9.

The Park Service violated the mandatory access provision Congress placed in ANILCA, granting reasonable and feasible access, by subjecting the Hales' access to their property to a NEPA analysis and the resulting access restrictions. The Hales required access during the summer, before harsh winter conditions prevented safe access. The Hales' access required use of their motorized, tracked vehicle because it can readily ford open water (the Road crosses McCarthy Creek a number of times) and because it can pull the heavy large materials, building supplies, fuel and food, that the Hales need to transport.

The only forms of access the Park Service allows inholders without a permit, are horseback and foot, which are wholly inadequate and infeasible for the Hales to use because neither they nor horses can adequately transport the needed materials. Snow machine use is also inadequate and infeasible because snow machines can be used only in certain restricted wintertime conditions when travel is treacherous, especially with large materials over mountainous roads. So long as the Park Service requires a NEPA analysis before allowing adequate and feasible access, the Park Service violates ANILCA and Congress' guarantee of adequate and feasible access, and exceeds its discretion to reasonably regulate access.

**B. The Lower Court Decisions**

The Hales asked the district court to declare that ANILCA provided them the right to continue using a motorized vehicle on the only road accessing their land and to enjoin the Park Service from preventing them from accessing their land over the road by any method other than foot, horseback, or snow machine. The Hales relied on the Park Service's legal obligations under ANILCA and former R.S. 2477. The Hales contended that, with these statutes, Congress commanded the Park Service to allow adequate and feasible access to owners of private land within national parks and preserves.

The district court denied the Hales relief and dismissed their case, finding that it had no jurisdiction and the Hales' access rights were subject to "reasonable regulation."[21] The Hales filed a motion for reconsideration, which the district court denied.[22] The court did not make any factual findings. In fact, it expressly eschewed reaching any factual conclusions regarding the reasonableness of the Hales' access: "The Court has yet to visit the site and cannot therefore render a personal opinion with regard to the reasonableness of various modes of travel."[23]

The Hales filed a notice of appeal and an emergency motion for an injunction pending appeal under Ninth Circuit Rule 27-3. In a summary order, the Ninth Circuit denied the motion for emergency relief and dismissed the Hales' appeal.

The Hales filed a motion for reconsideration, which the court granted and reinstated the Hales' appeal. The Hales' appeal concerned the Park Service's decision that it would not allow the Hales adequate and feasible access to their property without first completing a NEPA analysis. The Hales contend that Section 1110(b) of ANILCA, entitled, "Special Access and Access to Inholdings," *commands* the Park Service to provide such rights as necessary to assure adequate and feasible access to private landowners notwithstanding any other law. 16 U.S.C. § 3170(b). This congressional guarantee of access limits the Park Service's regulatory discretion such that *reasonable* regulation, allowed under ANILCA, could not deny adequate and feasible access for rebuilding the Hales' home, and specifically foreclosed the Park Service's ability to deny adequate and feasible access pending completion of a NEPA review.

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[21] App. A at A-5.

[22] App. E.

[23] *Id.* at E-3, ¶ 7.

The Ninth Circuit held (*Hale I*) that (1) the court lacked jurisdiction to reach the merits of the case because the Park Service had not issued a permit granting or denying the Hales' access; (2) the Hales' access to their property was subject to reasonable regulation under ANILCA; and (3) the Park Service could regulate the Hales' use of the Road even if the Road existed as a valid R.S. 2477 right-of-way.[24]

The Hales filed a petition for rehearing and for rehearing *en banc*. In denying the Hale's petition, the Ninth Circuit also withdrew its decision in *Hale I* and issued an amended opinion *Hale II*.[25] The Ninth Circuit's subsequent opinion differed from its first in determining that it possessed jurisdiction to reach the merits of the case.[26] However, *Hale II* affirmed the previous holdings that (1) the Park Service may condition the Hales' ANILCA access rights on a NEPA analysis, despite Congress' mandate that ANILCA ensures adequate and feasible access notwithstanding any other law; and, (2) the Park Service could regulate the Hales' use of the Road even if the Road existed as a valid R.S. 2477 right-of-way.[27]

After the Hales petitioned for a writ of certiorari,[28] on October 2, 2006, the Ninth Circuit contacted the parties and directed them to file new briefing to decide whether the case should be reheard en banc. On February 5, 2007, the Ninth Circuit withdrew and replaced its previous decision with *Hale III*. This third opinion of the Ninth Circuit affirmed its decision in *Hale II*, but found that the Park Service's requirement that a

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[24] App. C at C-4 to C-5.

[25] App. B at B-2.

[26] *Id.* at B-4 to B-8.

[27] *Id.* at B-8 to B-11.

[28] No. 06-090.

NEPA analysis be performed with a routine permit application was not a per se violation of ANILCA's requirement of reasonable and feasible access.

The Ninth Circuit also, for the first time in this litigation, made several factual determinations to support its holding. It found that the "trips contemplated by the Hales threatened to cause significantly more environmental damage than would be caused by the more usual post-freeze up runs."[29] It also found that "the Hales' principal justification for this [the Hales'] request—that it was more dangerous to drive in the winter—makes no sense to those experienced with conditions in Alaska."[30]

On February 20, 2007, the Hales withdrew their petition in No. 06-090, based on the withdrawal by the Ninth Circuit of *Hale II*. The petition now being filed with this Court stems from *Hale III*.

## REASONS FOR GRANTING THE WRIT

### I

### THIS COURT SHOULD ADDRESS THE EXCEPTIONALLY IMPORTANT ISSUE CONCERNING CONGRESS' CAREFULLY CRAFTED PROTECTION OF THE ACCESS MANDATED IN ANILCA

ANILCA allows the Park Service to *reasonably* regulate access. However, the Park Service's requirement of a NEPA review exceeds its regulatory discretion and eviscerates Congress' carefully crafted balance in ANILCA between reasonable regulation and mandatory access. The core of this

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[29] *See* App. A at A-11 (9th Circuit's conclusions).

[30] *Id.* at A-11 to A-12.

dispute is whether Congress' grant to the Park Service of the authority to reasonably regulate access also provides the Park Service with discretion such that it can violate Congress' guarantee of adequate and feasible access. Although the Park Service possesses authority under ANILCA to reasonably regulate access, and to protect Park values, ANILCA limits the Park Service's regulatory discretion such that it may not deny adequate and feasible access. In short, access does not remain adequate and feasible during NEPA review because owners are totally deprived of the statutorily mandated right during the review.

In ANILCA, Congress already balanced environmental protection with citizens' right to access their property—allowing "reasonable regulation" to protect park values. The words Congress chose to guarantee access are significant—Congress' guarantee commands the Park Service to grant that access which is adequate and feasible under the circumstances—notwithstanding any other law. 16 U.S.C. § 3170(b). The Park Service cannot burden access with requirements that render it inadequate or infeasible, thereby violating Congress' mandate that the Park Service "*shall* [*grant*] . . . adequate and feasible access." *Id.*

Congress did not give the Park Service discretion to deny adequate and feasible access by unreasonably regulating access to inholdings. As the Senate explained upon passage of ANILCA:

> The subsection on access to inholdings, provides that, where a State or private interest in land is surrounded by one or more conservation system units, . . . the Secretary shall grant the owner of the private interest such rights as may be necessary to assure adequate access for economic and other purposes.

S. Rep. 96-413, at 248 (1979).

The Committee Reports accompanying ANILCA indicate Congress limited the Park Service's discretion to regulate access to inholdings:

> This provision *directs* the Secretary *to grant* the owner of an inholding *such rights as are necessary to assure adequate access* to the inholding, and is intended to assure a permanent right of access to the concerned land across, through or over these Federal lands by such State or private owners or occupiers and their successors in interest. The Committee recognizes that such rights may include the right to traverse the Federal land with aircraft, motor boats, *or land vehicles*, and to use such parts of the Federal lands as are necessary to construct safe routes for such vehicles.

*Id.* (emphases added).

Congress took care to explain the reasoning for granting such extraordinarily broad access rights to inholders:

> The Committee enacted this provision in recognition of the fact that restrictions placed on public access on or across many federal land areas in Alaska *may interfere with the ability of private inholders to exercise their right to use their lands*. The Committee believes that owners of inholdings *should not have their ability to enjoy their land reduced simply because restrictions are placed on general public access* to the land surrounding their inholdings.

*Id.* (emphases added). Thus, although the Park Service may restrict the public's access to the Park, it may not restrict the access of inholders such as the Hales. Clearly, "[t]he Committee adopted a specific standard regarding access" and "expects the Secretary to be reasonable and fair in his judgments regarding access." *Id.*

The Park Service's actions in this case exist in stark contrast to Congress' commands. Their home having burned down, the Hales desperately need a reasonable and feasible way to bring in building supplies before the onset of winter. At every turn, the Hales were met with resistance and the ultimate requirement that there could be no meaningful access until the Park Service completed a drawn out environmental review under NEPA.

The Park Service denied the Hales their right of "adequate access for economic or other purposes." Pursuant to Congress' guarantee, the Hales sought to use a land vehicle to access their property. But, despite Congress' direction, the Park Service refused to recognize such a right, and instead the Park Service ignored Congress' command and denied access except by foot, horseback, or snow machine in winter. The Park Service's denial of the Hales' access by motorized vehicle violates the mandatory, nondiscretionary access provisions Congress mandated in ANILCA.

For these reasons, this Court should address this important question to ensure that while the Park Service protects park values pursuant to its ANILCA authority, that it also grants landowners adequate and feasible access, thereby upholding Congress' guarantee and respecting Congress' carefully crafted balance between access rights and environmental protection.

## II

## THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN THE NINTH CIRCUIT'S OPINION AND TWO OF THIS COURT'S DECISIONS CONCERNING WHETHER CONGRESS INTENDED NEPA TO OVERRIDE SUBSTANTIVE STATUTES

Less than three years ago, this Court unanimously reversed the Ninth Circuit's interpretation of NEPA. *See Dep't of Transportation v. Public Citizen*, 541 U.S. 762 (2004). The

issue this Court addressed in *Public Citizen* was whether NEPA and the Clean Air Act "require[s] the Federal Motor Carrier Safety Administration to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers" before deciding whether to grant registration to Mexican trucks. *Id.* at 756. Like ANILCA in this case, the Safety Administration's governing statute instructs that the agency "shall" grant registration to any motor carrier meeting certain criteria. *Id.* at 766. This Court held that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, . . . under NEPA . . . the agency need not consider these effects in [an environmental analysis] when determining whether its action is a 'major Federal action.'" *Id.* at 770 (citation omitted).

Upholding the Safety Administration's decision to grant registration without considering the environmental impact of Mexican trucks, this Court stressed that

> [the agency] has only limited discretion . . . : It must grant registration to all domestic or foreign motor carriers that are "willing and able to comply with" the applicable . . . requirements. [The agency] has no statutory authority to . . . establish environmental requirements unrelated to motor carrier safety.

*Id.* at 758-59 (citation omitted). This Court concluded:

> Hence, under NEPA . . . the agency need not consider these effects . . . . [B]ecause [the agency] has no discretion to prevent the entry of Mexican trucks, [it] did not need to consider the environmental effects arising from the entry.

*Id.* at 770.

This Court's holding in *Public Citizen* applies equally to this case: Because the Park Service has no discretion under ANILCA to deny adequate and feasible access, the Park Service could not utilize a lengthy NEPA environmental review to deny

the Hales' access. Because Congress has not repealed the command "shall" in ANILCA, this case is similar to *Public Citizen*. "Shall" means, as it did in *Public Citizen*, that the Park Service has no discretion to deny adequate and feasible access. Just as in *Public Citizen*, the Park Service's action—granting adequate and feasible access to inholders—is not a legally relevant "cause" of any impact on the Park's environment because the Park Service had no discretion to deny adequate and feasible access. Accordingly, the Park Service's obligation to grant adequate and feasible access was not subject to a NEPA analysis and is inconsistent with Congress' ANILCA mandate. As a result, the Ninth Circuit's decision conflicts with this Court's unanimous decision.

Indeed, in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), this Court addressed the issue of whether the Interstate Commerce Commission was required to perform NEPA analysis when issuing orders. According to the Court,

> [t]he statutory language [of NEPA], in fact, indicates that NEPA was not intended to repeal by implication any other statute. Thus, 42 U.S.C. § 4335 specifies that "[t]he policies and goals set forth in (NEPA) are supplementary to those set forth in existing authorizations of Federal agencies," and 42 U.S.C. § 4334 instructs that the Act "shall (not) in any way affect the specific statutory obligations of any Federal agency . . . ."

*Id.* at 694.

Likewise, in *Flint Ridge Development Company v. Scenic Rivers Association of Oklahoma*, 426 U.S. 776 (1976), this Court addressed the issue of whether the Department of Housing and Urban Development (HUD) was required to comply with NEPA before allowing a disclosure statement filed with it by a private real estate developer pursuant to the

Interstate Land Sales Full Disclosure Act to become effective. Holding that HUD was not required to comply with NEPA before allowing a disclosure statement to become final, this Court held that "where a clear and unavoidable conflict in statutory authority exists, NEPA must give way." *Id.* at 788.

The Court held that such a conflict between NEPA and the Disclosure Act existed, and as such NEPA must give way because

> [i]t is inconceivable that an environmental impact statement could, in 30 days, be drafted, circulated, commended upon, and then reviewed and revised in light of the comments.

*Id.* at 788-89.

Accordingly, this Court concluded:

> In sum, even if the Secretary's action in this case constituted major federal action significantly affecting the quality of the human environment so that an environmental impact statement would ordinarily be required, there would be a clear and fundamental conflict of statutory duty. The Secretary cannot comply with the statutory duty to allow statements of record to go into effect within 30 days of filing . . . and simultaneously prepare impact statements on proposed developments. In these circumstances, we find that NEPA's impact statement requirement is inapplicable.

*Id.* at 791.

A similar conflict exists in this case. ANILCA commands the Park Service to allow adequate and feasible access to property owners. Yet, the Park Service denied the Hales' adequate and feasible access by requiring a NEPA analysis. Moreover, it took the Park Service five months to release the results of its NEPA analysis and finally offer the Hales a

temporary access permit.[31] The Park Service cannot comply with Congress' statutory command to allow adequate and feasible access and also perform a NEPA analysis.

As a result, a NEPA analysis is inapplicable and "NEPA must give way." *Flint Ridge*, 426 U.S. at 788. Nowhere in NEPA's terms did Congress indicate it intended to provide the Park Service with authority it had limited in ANILCA. Accordingly, this Court should resolve the conflict between the Ninth Circuit and this Court's opinions concerning whether Congress limited NEPA review in the ANILCA mandate to allow adequate and feasible access.

## III

## THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN THE NINTH CIRCUIT'S OPINION AND THE TENTH CIRCUIT CONCERNING FEDERAL CONTROL OVER STATE-OWNED RIGHTS-OF-WAY

The Ninth Circuit's decision held that "even if the Hales have a valid right-of-way over the [Road]—which we do not decide—the existence of that right-of-way would not shield them from reasonable regulation by the [Park Service]." *Hale III*, 476 F.3d at 699. In so holding, the Ninth Circuit's decision conflicts with *Southern Utah Wilderness Alliance (SUWA) v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005).

*SUWA* arose when county road crews entered public lands managed by the Bureau of Land Management (BLM) and graded 16 roads. *SUWA*, 425 F.3d at 742. Nine of the roads were within the Grand Staircase-Escalante National Monument. *Id.* The counties did not notify BLM in advance, or obtain permission to grade the roads. *Id.* With few exceptions, the

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[31] App. F.

counties had not previously graded any of the roads. *Id. SUWA* filed suit, alleging the counties had engaged in unlawful road construction activities and that BLM violated its duties under NEPA by not taking action against the counties. *Id.* The counties contended their activities were lawful because they occurred within R.S. 2477 rights-of-way. *Id.*

The Tenth Circuit determined that *SUWA*'s claims, in part, presented an issue of the scope of the R.S. 2477 rights-of-way:

> [T]he scope of an R.S. 2477 right of way is limited by the established usage of the route as of the date of repeal of the statute. That did not mean, however, that the road had to be maintained in precisely the same condition it was in on October 21, 1976; rather, it could be improved "as necessary to meet the exigencies of increased travel," so long as this was done "in the light of traditional uses to which the right-of-way was put" as of repeal of the statute in 1976.

*Id.* at 746 (quoting *Sierra Club v. Hodel*, 848 F.2d 1068, 1083 (10th Cir. 1988)). Accordingly, the Tenth Circuit held that unless the holder of an R.S. 2477 right-of-way across federal land proposes to undertake improvements in a right-of-way beyond mere maintenance, the holder need not obtain approval from the federal land management agency. *Id.* at 748. The Tenth Circuit explained that, in drawing the line between routine maintenance, which it held did not require consultation with BLM, and construction or improvement, which does require consultation, it endorsed the following definition:

> "[C]onstruction" . . . includes the widening of the road, the horizontal or vertical realignment of the road, the installation (as distinguished from cleaning, repair, or replacement in kind) of bridges, culverts and other drainage structures, as well as any significant change in the surface composition of the

> road (*e.g.*, going from dirt to gravel, from gravel to chipseal, from chipseal to asphalt, etc.), or any "improvement," "betterment," or any other change in the nature of the road that may significantly impact Park lands, resources, or values. "Maintenance" preserves the existing road, including the physical upkeep or repair of wear or damage whether from natural or other causes, maintaining the shape of the road, grading it, making sure that the shape of the road permits drainage[, and] keeping drainage features open and operable—essentially preserving the status quo.

*Id.* at 749 (citation omitted). The Tenth Circuit further explained that, under this standard, grading a road *for the first time* would constitute construction and would require advance consultation. *Id.* However, *grading or blading a road to preserve the character of the road in accordance with prior use* would not. *Id.* Thus, in some limited and narrow circumstances, actions involving R.S. 2477 rights-of-way may be subject to federal influence.

That is not the case here. Instead, this case involves those circumstances that, according to the Tenth Circuit, are not subject to federal discretion. Here, the Hales merely seek to continue using the Road for access to and from their land. The Hales need nothing more than to pull a trailer with a motorized, tracked vehicle. The Hales do not intend to perform any construction or make any improvements to the road beyond routine maintenance. Accordingly, the circumstances in *SUWA* are strikingly similar to those of this case and the Hales do *not* require the Park Service's approval for their use of the road because the Park Service has no control over continued historical use of a valid, existing R.S. 2477 right-of-way. *SUWA*, 425 F.3d at 749.

This Court should grant certiorari to resolve the conflict among the circuits concerning federal control over state-owned rights-of-way.

## IV

## THIS COURT SHOULD GRANT REVIEW TO RESOLVE WHETHER AN APPELLATE COURT MAY BASE AN OPINION ON FACTUAL QUESTIONS NOT HEARD OR REACHED BY THE TRIAL COURT

In its third and final iteration of the operative decision, the Ninth Circuit buttressed its opinion with factual conclusions that had previously never been decided or even heard by any court. The Ninth Circuit based its holding that NPS did not violate ANILCA's promise of "reasonable and feasible access" in part on certain factual determinations that were not part of the trial court's holdings. In particular, the Ninth Circuit found that the "trips contemplated by the Hales threatened to cause significantly more environmental damage than would be caused by the more usual post-freeze up runs."[32] It also found that "the Hales principal justification for this [the Hale's] request—that it was more dangerous to drive in the winter—makes no sense to those experienced with conditions in Alaska."[33] While the Hales strongly disagree with these factual findings, it is more important to note that they never had an opportunity to litigate these assertions. Indeed, the *Alaska-based* trial court noted: "The Court has yet to visit the site and cannot therefore render a personal opinion with regard to the reasonableness of various modes of travel."[34]

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[32] *See* App. A at A-11 (9th Circuit's conclusions).

[33] *Id.* at A-11 to A-12.

[34] App. E at E-3, ¶ 7.

With this petition, the Hales are not asking this Court to address these factual conclusions, but seek a ruling that the Ninth Circuit cannot reach such determinations until they are first litigated in the trial court. They do so because the Ninth Circuit's action is in conflict both with decisions of this Court (regarding an appellate court's ability to arrive at factual findings not reached by a trial court) and with the decisions of other circuits (holding that the question of what is reasonable access to property is a question of fact, not law).

Federal Rule of Civil Procedure § 52(a) states, "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." This Court has repeatedly stated that appellate courts should accept district court findings of fact that are not clearly erroneous. *See, e.g.*, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 n.14 (2001) (referencing factual review standard in case concerning the constitutionality of a punitive damages award); *Dickinson v. Zurko*, 527 U.S. 150, 153 (1999) (comparing the level of deference given to district court findings of fact to deference given to agency findings of fact); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995) (upholding a district court's factual finding that parties did not agree to arbitrate dispute). In this case, of course, there were *no* findings of fact because the district court wrongly dismissed the case on procedural grounds. But just as it is inappropriate for an appellate court to reject trial court findings of fact that are not clearly erroneous, it is equally inappropriate for an appellate court to arrive independently at findings of fact that are not reached, decided, or even heard by the trial court. With this petition, this Court has an opportunity to establish the degree to which an appellate court can sua sponte reach factual conclusions that are not part of the trial court proceedings.

It should be noted, moreover, that if the Ninth Circuit were deciding the issue of whether the Park Service's actions gave the Hales reasonable access as a matter of *law*, it would be in conflict with those Circuits that have found that the question of reasonable access is one of *fact*.[35] For example, the First, Second, and Third Circuits have all found that what constitutes reasonable access is a question of fact. *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp.*, 294 F.3d 307, 326 (2d Cir. 2002), *rev'd in part by Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, 540 U.S. 398 (2004); *N.H. Motor Transport Ass'n v. Town of Plaistow*, 67 F.3d 326, 331 (1st Cir. 1995); *United States v. Certain Land in City of Newark, County of Essex, State of N.J.*, 439 F.2d 670, 673 (3d Cir. 1971).

## CONCLUSION

For the reasons contained herein, the Hales respectfully ask that this Court grant their Petition for Writ of Certiorari.

DATED: May, 2007.

Respectfully submitted,

JAMES S. BURLING
*Counsel of Record*
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

*Counsel for Petitioners*

[35] These cases are, of course, outside the context of ANILCA. Nevertheless, the underlying question of what is reasonable access to property is not a question unique to ANILCA, and traditional understandings of that question should, as a matter of logic, inform similar determinations under ANILCA.

Appendix A–1

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

ROBERT HALE; JOSHUA HALE; NAVA S. SUNSTAR; BUTTERFLY SUNSTAR,
*Plaintiffs-Appellants,*

v.

GALE NORTON, Secretary of the Interior; GARY CANDELARIA, Superintendent, Wrangell-St. Elias National Park and Preserve; HUNTER SHARP, Chief Ranger, Wrangell-St. Elias National Park and Preserve; DEPARTMENT OF THE INTERIOR; NATIONAL PARK SERVICE; FRAN MAINELLA, Director of the National Park Service; MARCIA BLASZAK, Acting Regional Director of the National Park Service; all in their official capacities,
*Defendants-Appellees,*

NATIONAL PARK CONSERVATION ASSOCIATION; THE WILDERNESS SOCIETY; ALASKA CENTER FOR THE ENVIRONMENT,
*Defendants-Intervenors-Appellees.*

No. 03-36032

D.C. No. CV-03-00257-A-RRB

ORDER WITHDRAWING OPINION AND OPINION

Appendix A–2

Appeal from the United States District Court
for the District of Alaska
Ralph R. Beistline, District Judge, Presiding

Argued and Submitted
July 12, 2005—Anchorage, Alaska

Filed February 5, 2007

Before: Alfred T. Goodwin, Melvin Brunetti, and
William A. Fletcher, Circuit Judges.

Opinion by Judge William A. Fletcher

## COUNSEL

Russell C. Brooks and James S. Burling, Pacific Legal Foundation, Sacramento, California, for the plaintiffs-appellants.

Matthew J. Sanders, United States Department of Justice, Washington, D.C., for the defendants-appellees.

Robert W. Randall and Rebecca L. Bernard, Trustees for Alaska, Anchorage, Alaska, for the defendants-intervenors-appellees.

## ORDER

This court's opinion filed on August 25, 2006, and published at 461 F.3d 1092 (9th Cir. 2006), is withdrawn and replaced by the attached opinion.

No further petitions for rehearing or petitions for rehearing en banc may be filed.

Appendix A–3

## OPINION

W. FLETCHER, Circuit Judge:

In 2002, plaintiffs-appellants (collectively, "the Hales") purchased 410 acres of land near McCarthy, Alaska. Their property is completely surrounded by the Wrangell-St. Elias National Park and Preserve (the "Park"), which was created in 1980. The Hales gain access to their property over what used to be the thirteen-mile McCarthy-Green Butte Road (the "MGB road"). In 1938, the Alaska Road Commission listed the MGB road as "abandoned." All of its bridges have washed away, and the effects of vegetation and erosion have reduced it to little more than a trail. Whatever road-like qualities the route presently has is due to the Hales' un-permitted "clearing" activities. The primary use of the trail by the plaintiffs has, until recently, been on horse-back.

The house on the Hales' property burned down in the spring of 2003. During the course of rebuilding, the Hales used a bulldozer to bring in supplies over the MGB road without first seeking authorization from the National Park Service ("NPS"). Shortly thereafter, the NPS posted a public notice stating that no motorized vehicles except snow machines could use the MGB road. In July 2003, the Hales contacted the NPS superintendent to request a permanent permit to traverse the MGB road with a D-4 or D-5 bulldozer towing a sixteen foot trailer. The bulldozer used would weigh between 17,000 and 21,000 pounds, and would be between 8 and 11 feet wide. The trailer used would weigh, with supplies, between 3,000 and 5,000 pounds, and would be 8 feet wide. The superintendent responded promptly, offering to assist the Hales in preparing the necessary applications for a right-of-way permit. Two months later, in September 2003, the Hales submitted an "emergency" application for a temporary permit, asserting that they needed to transfer supplies before "freeze up."

The NPS promptly responded by letter, requesting more information about the nature of the emergency and the proposed bulldozer use. In particular, the letter articulated the NPS's concern that the Hales were planning to run the bulldozer over the route before "freeze up." The NPS noted that other inholders in the Park had "been able to adapt to the winter schedule for freighting supplies and building materials," using bulldozers for access in the winter months (that is, after "freeze up") when the frozen ground and snow cover protected the earth from extensive damage. The NPS explained that "[t]ravel over unfrozen ground causes significantly more damage," and that because such travel "falls outside of any environmental assessment previously undertaken by the Park," the Hales' permit request "will required [sic] a more extensive review under the National Environmental Policy Act [NEPA] . . . ."

The Hales responded in writing, but did not provide all of the requested information. The NPS then informed the Hales in a letter that an environmental assessment ("EA") would be required before the agency could grant a permit for bulldozer use. The NPS explained that it did not regard the situation as falling within the emergency exception to the requirements of the National Environmental Policy Act ("NEPA"), as set out in 40 C.F.R. § 1506.11. In the same letter, the NPS expressed concern that the Hales' requested trips "would entail a total of about 230 crossings of McCarthy Creek, a stream with a native Dolly Varden trout population." The Hales' own expert later acknowledged that there could be damage to the environment, including having to "scrape down to the mineral soil" in one section of the road and using "blade engagement to redistribute some of the sloughed material on the existing road surface" in another section.

In a series of contacts in September and October 2003, the NPS offered to prepare an EA and make a decision in approximately nine weeks. It also offered to waive the expense of conducting the EA. However, the Hales did not provide the

information the NPS requested in order to conduct the EA. Instead, in November 2003, they filed this suit. They sought an injunction requiring the NPS to provide what they deemed adequate and feasible access to their property, and a declaratory judgment that the NPS was violating their right-of-way over the MGB road by requiring a permit. They also sought a declaratory judgment that issuing a permit for use of the MGB road did not constitute a major federal action subject to the requirements of NEPA. The Hales moved for a Temporary Restraining Order ("TRO") and a preliminary injunction.

The district court denied the motion for the TRO and dismissed the case for lack of subject matter jurisdiction. The court held that even if the Hales had a valid right-of-way over the MGB road, their use of the road was subject to reasonable regulation by the NPS. Consequently, the Hales were required to apply for a permit, regardless of any right-of-way they might possess. Since the NPS had not acted on the Hales' permit application, the district court held that it lacked jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 704, because there was no final agency action to review.

The Hales timely appealed.

## I. Jurisdiction

We review de novo dismissals for lack of subject matter jurisdiction. *Kaiser v. Blue Cross of Cal.*, 347 F.3d 1107, 1111 (9th Cir. 2003).

[1] The Administrative Procedure Act provides for judicial review only of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The Supreme Court has explained that

> [a]s a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the

> agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights and obligations have been determined," or from which "legal consequences will flow."

*Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted). "[T]he fact that a statement may be definitive on some issue is insufficient to create a final action subject to judicial review." *Indus. Customers of Nw. Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 646 (9th Cir. 2005). For example, courts have found that "[a] requirement that a party participate in additional administrative proceedings is different in kind and legal effect from the burdens attending what heretofore has been considered to be final agency action." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1279 (D.C. Cir. 2005) (internal quotation marks and citation omitted); *see also Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Eng'rs*, 335 F.3d 607, 616 (7th Cir. 2003).

[2] Even if a particular agency action does not, on its own, satisfy the principle of finality, the collateral order doctrine may nevertheless preserve jurisdiction. Under the collateral order doctrine, a "small class" of orders that do not end the proceedings below is treated as final and immediately appealable. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). To come within this "small class," "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

The collateral order doctrine arose as a "practical construction" of 28 U.S.C. § 1291, which requires that appellate courts review only "final decisions" of district courts. *See*

*Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). However, the doctrine also applies to judicial review of administrative proceedings. *See, e.g., FTC v. Standard Oil Co.*, 449 U.S. 232, 246 (1980) (applying the doctrine to determine the reviewability of an agency order); *Rhode Island v. EPA*, 378 F.3d 19, 23-25 (1st Cir. 2004) (discussing the circuit consensus that the collateral order doctrine applies to administrative determinations).

[3] The Alaska National Interest Lands Conservation Act ("ANILCA") provides limited access rights for inholders such as the Hales. The statute provides,

> Notwithstanding any other provisions of this Act or other law . . . the State or private owner or occupier shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land . . . . Such rights shall be subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands.

16 U.S.C. § 3170(b). The Hales contend that the guarantee of "adequate and feasible access" under ANILCA supersedes other laws, including NEPA, and thus it is unreasonable for the NPS, acting on behalf of the Secretary of the Department of the Interior, to subject their permit request to any NEPA analysis. Framed this way, the Hales' complaint does not challenge the result of the permitting process which, as the district court found, had not produced a final action at the time of the Hales' suit. Rather, it challenges the authority of the NPS to subject the permit request to a NEPA analysis in the first place. *See* 43 C.F.R. §§ 36.6, 36.10(d).

[4] Given ANILCA's unique statutory scheme, the Hales' challenge is analogous to an appeal from the rejection of a qualified immunity defense that turns on an issue of law—an order that squarely falls within the collateral order doctrine.

*See, e.g., Behrens v. Pelletier*, 516 U.S. 299, 305 (1996). Qualified immunity provides

> an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.

*Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The Hales claim that because ANILCA guarantees access "[n]otwithstanding any . . . other law," they are entitled to immunity from the burden that would be imposed by a NEPA analysis. Like qualified immunity, the Hales' claim turns on an "essentially legal question," and that claim is "effectively lost" if the NPS conducts the NEPA analysis. If the Hales must wait until after the analysis is performed to challenge the NPS's permitting decision, any question about the applicability of NEPA is likely to fall away. The district court will review the NPS's substantive determination of "adequate and feasible access . . . subject to reasonable regulations" with reference to the permit issued (or denied), and the NEPA procedure that the NPS followed in reaching its permitting decision will likely not be relevant to that determination.

[5] We hold that the Hales here challenge an administrative decision that, like an order that denies a qualified immunity defense, satisfies the "conclusiveness," "separability," and "unreviewability" prongs of the collateral order doctrine. First, the regulations incorporating NEPA into the permitting process are clearly conclusive and not tentative. Second, the determination of whether the Department of the Interior can incorporate NEPA into the permitting process is a pure and independent question of law, separate from whether

the access ultimately afforded is "adequate and feasible" within the meaning of ANILCA. Third, if the Hales must wait for the NPS's ultimate permitting decision, the Department of the Interior's decision to apply NEPA will likely become effectively unreviewable. *Cf Meredith v. Fed. Mine Safety & Health Review Comm'n*, 177 F.3d 1042, 1050-52 (D.C. Cir. 1999) (applying collateral order doctrine to review an administrative order that rejected defendants' assertion of statutory immunity). We therefore conclude that we have jurisdiction over the Hales' appeal under the collateral order doctrine.

## II. Discussion

[6] The Hales' ability to use the MGB road within the Park is subject to reasonable regulation. In *United States v. Vogler*, 859 F.2d 638 (9th Cir. 1988), we decisively rejected the argument that the NPS lacks the power to regulate travel to an inholding across federally protected land. In *Vogler*, an inholder in the Yukon-Charley Rivers National Preserve in Alaska sought to drive heavy equipment over a claimed R.S. 2477 trail without a permit. *Id.* at 640-42. Assuming, without deciding, that the trail qualified as a right-of-way, we held that the government could nevertheless regulate the inholder's use of the trail:

> Congress has made it clear that the Secretary has broad power to regulate and manage national parks. The Secretary's power to regulate within a national park to "conserve the scenery and the nature and historic objects and wildlife therein . . . ." applies with equal force to regulating an established right of way within the park . . . [T]he regulations here are necessary to conserve the natural beauty of the Preserve; therefore, they lie within the government's power to regulate national parks.

*Id.* at 642 (quoting 16 U.S.C. § 1). Consequently, even if the Hales have a valid right-of-way over the MGB road—which we do not decide—the existence of that right-of-way would not shield them from reasonable regulation by the NPS.

[7] ANILCA provides access rights for inholders, but it also contemplates reasonable government regulation. Under ANILCA, inholders are entitled to "such rights as may be necessary to assure adequate and feasible access" to their land "notwithstanding any . . . other law," but these access rights are "subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands." 16 U.S.C. § 3170(b).

NEPA requires the preparation of an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). The regulations direct agencies to prepare an "environmental assessment" ("EA") to determine whether an EIS is necessary unless the proposal is one that "[n]ormally requires" an EIS, or is one that "[n]ormally does not require" either an EIS or an EA. *See* 40 C.F.R. § 1501.4(a)-(b). Even if an EA is not required, however, "[a]gencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking." 40 C.F.R. § 1501.3(b).

[8] NEPA ensures that an agency, "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts," and will make such information available to the public. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). "NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Id.* at 350. Significantly, "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the

agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Id.*

[9] This case differs from *Vogler* only in that the Department of the Interior has, by regulation, incorporated a NEPA review process into its permit-granting procedure. We see no *per se* conflict between NEPA's information-gathering and analysis requirements and ANILCA's requirement of "adequate and feasible access . . . subject to reasonable regulations . . . to protect the natural and other values of such lands." 16 U .S.C. § 3170(b). NEPA expressly provides that "to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this [Act]." 42 U.S.C. § 4332. In our view, NEPA helps rather than hinders the NPS in fulfilling its statutory duty under ANILCA to balance "adequate and feasible access" with the protection of "natural and other values of [the] lands."

A requirement that an EA or EIS be prepared in connection with a routine permit application might conflict with ANILCA's requirement of "adequate and feasible access," depending on the nature of the application and the possible time and cost involved in a NEPA review. But that is not the situation in the present appeal.

[10] In this case, we hold that the NPS acted reasonably in requiring an EA. The Hales' request to make sixteen trips with a bulldozer and trailer during the pre-freeze up period was an out-of-the-ordinary request. The trips contemplated by the Hales threatened to cause significantly more environmental damage than would be caused by the more usual post-freeze up runs. Their request was tantamount to a request to rebuild and reopen the overgrown trail that the "MGB road" had become in the two thirds of a century since it was abandoned. Moreover, the Hales' principal justification for this request—that it was more dangerous to drive in the winter—makes no sense to those

experienced with conditions in Alaska. As the NPS wrote in response to the Hales' request, other inholders successfully operate similar vehicles, but they do so only in the winter. Winter use both protects the natural environment from damage and protects inholders from getting stuck in the mud. Finally, the NPS committed to complete the environmental assessment in nine weeks and waived the cost of the assessment. In short, the NPS appears to have done everything it could to accommodate the Hales and to facilitate reasonable access to their property. The Hales, on the other hand, refused to cooperate in the process, and failed to provide the NPS with the information it needed to grant an appropriate permit. In these circumstances, it was entirely appropriate for the NPS to apply a NEPA analysis to the Hales' request.

## Conclusion

We hold that the district court had jurisdiction to consider the Hales' challenge to the incorporation of NEPA into ANILCA's permitting process, and that conducting a NEPA analysis was consistent with the "adequate and feasible access" right of ANILCA.

**AFFIRMED.**

Appendix B-1

No. 03-36032

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Robert HALE; Joshua Hale; Nava S. Sunstar; Butterfly Sunstar,

Plaintiffs-Appellants,

v.

Gale NORTON, Secretary of the Interior; Gary Candelaria, Superintendent, Wrangell-St. Elias National Park and Preserve; Hunter Sharp, Chief Ranger, Wrangell-St. Elias National Park and Preserve; Department of the Interior; National Park Service; Fran Mainella, Director of the National Park Service; Marcia Blaszak, Acting Regional Director of the National Park Service; all in their official capacities, Defendants-Appellees, National Parks Conservation Association; The Wilderness Society; Alaska Center for the Environment,

Defendants-Intervenors-Appellees.

Argued and Submitted July 12, 2005.
Filed Aug. 25, 2006.

**Background:** Alaska landowners brought action seeking to compel National Park Service (NPS) to provide feasible access to their property, which was surrounded by national park. The United States District Court for the District of Alaska, Ralph R. Beistline, J., dismissed the case for lack of subject matter jurisdiction, and landowners appealed.

**Holdings:** The Court of Appeals, William A. Fletcher, Circuit Judge, held that:

(1) dismissal of complaint challenging the authority of the Department of the Interior to subject the permit request under Alaska National Interest Lands Conservation Act (ANILCA) to a National Environmental Policy Act (NEPA) analysis fell within the collateral order doctrine, and

(2) incorporation of NEPA into ANILCA's permit-granting procedure was consistent with ANILCA.

Affirmed; petition for rehearing and petition for rehearing en banc denied.

Opinion 437 F.3d 892, withdrawn.

Before ALFRED T. GOODWIN, MELVIN BRUNETTI, and W. FLETCHER, Circuit Judges.

ORDER

This court's opinion filed on February 9, 2006, and published at 437 F.3d 892 (9th Cir. 2006), is withdrawn and replaced by the attached opinion.

With the filing of this new opinion, the panel has voted unanimously to deny Appellants' petition for rehearing. Judge Fletcher has voted to deny the petition for rehearing en banc, and Judge Goodwin and Brunetti so recommend. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Appellants' petition for rehearing and petition for rehearing en banc, filed March 24, 2006, are DENIED.

Appendix B-3

OPINION

WILLIAM A. FLETCHER, Circuit Judge.

In 2002, plaintiffs-appellants (collectively, "the Hales") purchased 410 acres of land near McCarthy, Alaska. Their property is completely surrounded by the Wrangell-St. Elias National Park and Preserve (the "Park"), which was created in 1980. The Hales gain access to their property over what used to be the thirteen-mile McCarthy-Green Butte Road (the "MGB road"). In 1938, the Alaska Road Commission listed the MGB road as "abandoned." All of its bridges have washed away, and the effects of vegetation and erosion have reduced it to little more than a trail.

The house on the Hales' property burned down in the spring of 2003. During the course of rebuilding, the Hales used a bulldozer to bring in supplies over the MGB road without first seeking authorization from the National Park Service ("NPS"). Shortly thereafter, the NPS posted a public notice stating that no motorized vehicles except snow machines could use the MGB road. In July 2003, the Hales contacted the NPS superintendent to request a permanent permit to traverse the MGB road with a bulldozer and a trailer. The superintendent responded promptly, offering to assist the Hales in preparing the necessary applications for a right-of-way permit. Two months later, in September 2003, the Hales submitted an "emergency" application for a temporary permit, asserting that they needed to transfer supplies before "freeze up."

The NPS promptly responded by letter, requesting more information about the nature of the emergency and the proposed bulldozer use. The letter noted that other inholders in the Park had used bulldozers for access in the winter months (that is, after "freeze up") when the frozen ground and snow cover protected the ground from damage. The Hales responded in writing, but did not provide all of the requested information. The NPS then informed the Hales that an environmental

assessment ("EA") would be required before the agency could grant a permit for bulldozer use. The NPS explained that it did not regard the situation as falling within the emergency exception to the requirements of the National Environmental Policy Act ("NEPA"), as set out in 40 C.F.R. § 1506.11.

In a series of contacts in September and October 2003, the NPS offered to prepare an EA and make a decision in approximately nine weeks. It also offered to waive the expense of conducting the EA. The Hales did not provide the information the NPS requested in order to conduct the EA. Instead, in November 2003, they filed this suit. They sought an injunction requiring the NPS to provide what they deemed adequate and feasible access to their property, and a declaratory judgment that the NPS was violating their right-of-way over the MGB road by requiring a permit. They also sought a declaratory judgment that issuing a permit for use of the MGB road did not constitute a major federal action subject to the requirements of NEPA. The Hales moved for a Temporary Restraining Order ("TRO") and a preliminary injunction.

The district court denied the motion for the TRO and dismissed the case for lack of subject matter jurisdiction. The court held that even if the Hales had a valid right-of-way over the MGB road, their use of the road was subject to reasonable regulation by the NPS. Consequently, the Hales were required to apply for a permit, regardless of any right-of-way they might possess. Since the NPS had not acted on the Hales' permit application, the district court held that it lacked jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 704, because there was no final agency action to review.

**I. Jurisdiction**

We review de novo dismissals for lack of subject matter jurisdiction. *Kaiser v. Blue Cross of Cal.*, 347 F.3d 1107, 1111 (9th Cir. 2003).

The Administrative Procedure Act provides for judicial review only of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The Supreme Court has explained that

> [a]s a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process-it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights and obligations have been determined," or from which "legal consequences will flow."

*Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L.Ed.2d 281 (1997) (citations omitted). "[T]he fact that a statement may be definitive on some issue is insufficient to create a final action subject to judicial review." *Indus. Customers of Nw. Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 646 (9th Cir. 2005). For example, courts have found that "[a] requirement that a party participate in additional administrative proceedings is different in kind and legal effect from the burdens attending what heretofore has been considered to be final agency action." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1279 (D.C. Cir. 2005) (internal quotation marks and citation omitted); *see also Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Eng'rs*, 335 F.3d 607, 616 (7th Cir. 2003).

Even if a particular agency action does not, on its own, satisfy the principle of finality, the collateral order doctrine may nevertheless preserve jurisdiction. Under the collateral order doctrine, a "small class" of orders that do not end the proceedings below are treated as final and immediately appealable. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L.Ed. 1528 (1949). To come

within this "small class," "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S. Ct. 2454, 57 L.Ed.2d 351 (1978).

The collateral order doctrine arose as a "practical construction" of 28 U.S.C. § 1291, which requires that appellate courts review only "final decisions" of district courts. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867, 114 S. Ct. 1992, 128 L.Ed.2d 842 (1994). However, the doctrine also applies to judicial review of administrative proceedings. *See, e.g., FTC v. Standard Oil Co.*, 449 U.S. 232, 246, 101 S. Ct. 488, 66 L.Ed.2d 416 (1980) (applying the doctrine to determine the reviewability of an agency order); *Rhode Island v. EPA*, 378 F.3d 19, 23-25 (1st Cir. 2004) (discussing the circuit consensus that the collateral order doctrine applies to administrative determinations).

The Alaska National Interest Lands Conservation Act ("ANILCA") provides limited access rights for inholders such as the Hales. The statute provides,

> Notwithstanding any other provisions of this Act or other law . . . the State or private owner or occupier shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land . . . regulations issued by the Secretary to protect the natural and other values of such lands.

16 U.S.C. § 3170(b). The Hales contend that the guarantee of "adequate and feasible access" under ANILCA supersedes other laws, including NEPA, and thus it is unreasonable for the NPS, acting on behalf of the Secretary of the Department of the Interior, to subject their permit request to any NEPA analysis. Framed this way, the Hales' complaint does not challenge the

result of the permitting process which, as the district court found, had not produced a final action at the time of the Hales' suit. Rather, it challenges the authority of the Department of the Interior to subject the permit request to a NEPA analysis in the first place. *See* 43 C.F.R. §§ 36.6, 36.10(d).

Given ANILCA's unique statutory scheme, the Hales' challenge is analogous to an appeal from the rejection of a qualified immunity defense that turns on an issue of law-an order that squarely falls within the collateral order doctrine. *See, e.g., Behrens v. Pelletier*, 516 U.S. 299, 305, 116 S. Ct. 834, 133 L.Ed.2d 773 (1996). Qualified immunity provides

> an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.

*Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L.Ed.2d 411 (1985). The Hales claim that because ANILCA guarantees access "[n]otwithstanding any . . . other law," they are entitled to immunity from the burdens of NEPA analysis. Like qualified immunity, the Hales' claim turns on an "essentially legal question," and that claim is "effectively lost" if the NPS conducts the NEPA analysis. If the Hales must wait to challenge the NPS's actual permitting decision, the relevance of NEPA is likely to fall away. The district court will review the NPS's substantive determination of "adequate and feasible access . . . subject to reasonable regulations" with reference to the permit issued, and the procedure that the NPS followed in reaching its permitting decision will likely not be relevant to that determination.

We hold that the Hales here challenge an administrative decision that, like an order that denies a qualified immunity defense, satisfies the "conclusiveness," "separability," and "unreviewability" prongs of the collateral order doctrine. First, the regulations incorporating NEPA into the permitting process are clearly conclusive and not tentative. Second, the determination of whether the Department of the Interior can incorporate NEPA into the permitting process is a pure and independent question of law, separate from whether the access ultimately afforded is "adequate and feasible." Third, if the Hales must wait for the NPS's ultimate permitting decision, the Department of the Interior's decision to apply NEPA will likely become effectively unreviewable. *Cf. Meredith v. Fed. Mine Safety & Health Review Comm'n*, 177 F.3d 1042, 1050-52 (D.C. Cir. 1999) (applying collateral order doctrine to review an administrative order that rejected defendants' assertion of statutory immunity).

**II. Discussion**

We agree with the district court that the Hales' ability to use the MGB road within the Park is subject to reasonable regulation. In *United States v. Vogler*, 859 F.2d 638 (9th Cir. 1988), we decisively rejected the argument that the NPS lacks the power to regulate travel to an inholding across federally protected land. In *Vogler*, an inholder in the Yukon-Charley Rivers National Preserve in Alaska sought to drive heavy equipment over a claimed R.S. 2477 trail without a permit. *Id.* at 640-42. Assuming, without deciding, that the trail qualified as a right-of-way, we held that the government could nevertheless regulate the inholder's use of the trail:

> Congress has made it clear that the Secretary has broad power to regulate and manage national parks. The Secretary's power to regulate within a national park to "conserve the scenery and the nature and historic objects and wildlife therein. . . ." applies with

> equal force to regulating an established right of way within the park. . . . [T]he regulations here are necessary to conserve the natural beauty of the Preserve; therefore, they lie within the government's power to regulate national parks.

*Id.* at 642 (quoting 16 U.S.C. § 1). Consequently, even if the Hales have a valid right-of-way over the MGB road—which we do not decide—the existence of that right-of-way would not shield them from reasonable regulation by the NPS.

ANILCA provides limited access rights for inholders in the absence of a right-of-way, but it also contemplates reasonable government regulation. Under ANILCA, inholders are entitled to "such rights as may be necessary to assure adequate and feasible access" to their land, but these rights are "subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands." 16 U.S.C. § 3170(b).

NEPA requires the preparation of an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). The regulations direct agencies to prepare an "environmental assessment" ("EA") to determine whether an EIS is necessary unless the proposal is one that "[n]ormally requires" an EIS or that "[n]ormally does not require" either an EIS or an EA. *See* 40 C.F.R. § 1501.4(a)-(b). Even if an EA is not required, however, "[a]gencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking." 40 C.F.R. § 1501.3(b).

NEPA ensures that an agency, "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts," and will make such information available to the public. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S. Ct. 1835, 104 L.Ed.2d 351 (1989). "NEPA itself does not

mandate particular results, but simply prescribes the necessary process." *Id.* at 350, 109 S. Ct. 1835. Significantly, "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Id.*

This case differs from *Vogler* only in that the Department of the Interior has, by regulation, incorporated a NEPA review process into its permit-granting procedure. We see no conflict between NEPA's information-gathering and analysis requirements and ANILCA's requirement of "adequate and feasible access . . . subject to reasonable regulations . . . to protect the natural and other values of such lands." 16 U.S.C. § 3170(b). NEPA expressly provides that "to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this [Act]." 42 U.S.C. § 4332. In our view, NEPA helps rather than hinders the Department of the Interior in fulfilling its statutory duty under ANILCA to balance "adequate and feasible access" with the protection of "natural and other values." We therefore hold that the incorporation of NEPA into the permit-granting procedure is consistent with ANILCA.

**Conclusion**

We hold that the district court had jurisdiction to consider the Hales' challenge to the incorporation of NEPA into ANILCA's permitting process, and that conducting a NEPA analysis is consistent with the "adequate and feasible access" right of ANILCA.

AFFIRMED.

Appendix C-1

No. 03-36032

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Robert HALE; Joshua Hale; Nava S. Sunstar; Butterfly Sunstar,

Plaintiffs-Appellants,

v.

Gale NORTON, Secretary of the Interior; Gary Candelaria, Superintendent, Wrangell-St. Elias National Park and Preserve; Hunter Sharp, Chief Ranger, Wrangell-St. Elias National Park and Preserve; Department of the Interior; National Park Service; Fran Mainella, Director of the National Park Service; Marcia Blaszak, Acting Regional Director of the National Park Service; all in their official capacities, Defendants-Appellees, National Parks Conservation Association; The Wilderness Society; Alaska Center for the Environment,

Defendants-Intervenors-Appellees.

Argued and Submitted July 12, 2005.
Filed Feb. 9, 2006.

**Background:** Landowners brought action seeking to compel National Park Service (NPS) to provide feasible access to their property, which was surrounded by national park. The United States District Court for the District of Alaska, Ralph R. Beistline, J., dismissed the case for lack of subject matter jurisdiction, and landowners appealed.

**Holdings:** The Court of Appeals, William A. Fletcher, Circuit Judge, held that:

(1) landowners' use of the road within park was subject to reasonable regulation by the NPS, and

(2) district court did not have jurisdiction under the Administrative Procedure Act (APA) to reach merits of landowners' action.

Affirmed.

* * *

Before GOODWIN, BRUNETTI, and W. FLETCHER, Circuit Judges.

WILLIAM A. FLETCHER, Circuit Judge.

In 2002, plaintiffs-appellants (collectively "the Hales") purchased 410 acres of land near McCarthy, Alaska. Their property is completely surrounded by the Wrangell-St. Elias National Park and Preserve (the "Park"), which was created in 1980. The Hales gain access to their property over what used to be the thirteen-mile McCarthy-Green Butte Road (the "MGB road"). In 1938, the Alaska Road Commission listed the MGB road as "abandoned." All of its bridges have washed away, and the effects of vegetation and erosion have reduced it to little more than a trail.

The house on the Hales' property burned down in the spring of 2003. During the course of rebuilding, the Hales used a bulldozer to bring in supplies over the MGB road without first seeking authorization from the National Park Service ("NPS"). Shortly thereafter, the NPS posted a public notice stating that no motorized vehicles except snow machines could use the MGB road. In July 2003, the Hales contacted the NPS superintendent to request a permanent permit to traverse the MGB road with a bulldozer and a trailer. The superintendent promptly responded, offering to assist the Hales in preparing

the necessary applications for a right-of-way permit. Two months later, in September 2003, the Hales submitted an "emergency" application for a temporary permit, asserting that they needed to transfer supplies before "freeze up."

The NPS responded by letter, requesting more information about the nature of the emergency and the proposed bulldozer use. The letter noted that other inholders in the Park had used bulldozers for access in the winter months when the frozen ground and snow cover protected the ground from damage. The Hales responded in writing, but did not provide all of the requested information. The NPS then informed the Hales that an environmental assessment ("EA") would be required before the agency could grant a permit for bulldozer use. The NPS explained that it did not regard the situation as falling within the emergency exception to the requirements of the National Environmental Policy Act ("NEPA"), as set out in 40 C.F.R. § 1506.11.

In a series of contacts in September and October 2003, the NPS offered to prepare an EA and make a decision in approximately nine weeks. It also offered to waive the expense of conducting the EA. The Hales did not provide the information the NPS requested in order to conduct the EA. Instead, in November 2003, they filed this suit. They sought an injunction requiring the NPS to provide what they deemed adequate and feasible access to their property, and a declaratory judgment that the NPS was violating their right-of-way over the MGB road by requiring a permit. They also sought a declaratory judgment that issuing a permit for temporary use of the MGB road did not constitute a major federal action subject to the requirements of NEPA. The Hales moved for a Temporary Restraining Order ("TRO") and a preliminary injunction.

The district court denied the motion for the TRO and dismissed the case for lack of subject matter jurisdiction. The court held that even if the Hales had a valid right-of-way over the MGB road, their use of the road was subject to reasonable regulation by the NPS. Consequently, the Hales were required to apply for a permit regardless of any right-of-way they might possess. Since the NPS had not acted on the Hales' permit application, the district court held that it lacked jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 704, because there was no final agency action to review.

**I. Standard of Review**

We review de novo dismissals for lack of subject matter jurisdiction. *Kaiser v. Blue Cross of Cal.*, 347 F.3d 1107, 1111 (9th Cir. 2003).

**II. Jurisdiction**

We agree with the district court that the Hales' ability to use the MGB road within the Park is subject to reasonable regulation. In *United States v. Vogler*, 859 F.2d 638 (9th Cir. 1988), we decisively rejected the argument that the NPS lacks the power to regulate travel to an inholding across federally protected land. In *Vogler*, an inholder in the Yukon-Charley Rivers National Preserve in Alaska sought to drive heavy equipment over a claimed R.S. 2477 trail without a permit. *Id.* at 640-42. Assuming, without deciding, that the trail qualified as a right-of-way, we held that the government could nevertheless regulate the inholder's use of the trail:

> Congress has made it clear that the Secretary has broad power to regulate and manage national parks. The Secretary's power to regulate within a national park to "conserve the scenery and the nature and historic objects and wildlife therein . . ." applies with equal force to regulating an established right of way within the park . . . . [T]he regulations here are

> necessary to conserve the natural beauty of the Preserve; therefore, they lie within the government's power to regulate national parks.

*Id.* at 642 (quoting 16 U.S.C. § 1). Consequently, even if the Hales have a valid right-of-way over the MGB road—which we do not decide—the existence of that right-of-way would not shield them from reasonable regulation by the NPS.

The Alaska National Interest Lands Conservation Act ("ANILCA") provides limited access rights for inholders in the absence of a right-of-way, but it also contemplates reasonable government regulation. Under ANILCA, inholders are entitled to "such rights as may be necessary to assure adequate and feasible access" to their land, but these rights are "subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands." 16 U.S.C. § 3170(b).

We also agree with the district court that it was without jurisdiction to reach the merits of the Hales' suit. The Administrative Procedure Act provides for judicial review only of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Because the permitting process had not resulted in a final action at the time of the Hales' suit, the district court properly dismissed the suit for want of jurisdiction. Any judicial challenge may be brought only after final agency action.

AFFIRMED.

Appendix D-1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

| | |
|---|---|
| ROBERT HALE, JOSHUA HALE, NAVA S. SUNSTAR, and BUTTERFLY SUNSTAR,<br><br>Plaintiffs,<br><br>vs.<br><br>GALE NORTON, Secretary of the Interior; GARY CANDELARIA, Superintendent, Wrangell-St. Elias National Park and Preserve; HUNTER SHARP, Chief Ranger, Wrangell-St. Elias National Park and Preserve; DEPARTMENT OF THE INTERIOR; NATIONAL PARK SERVICE; FRAN MAINELLA, Director of the National Park Service; MARCIA BLASZAK, Acting Regional Director of the National Park Service, all in their official capacities,<br><br>Defendants. | FILED<br>NOV 18 2003<br>UNITED STATES<br>DISTRICT COURT<br>DISTRICT OF ALASKA<br><br>Case No. A03-0257 CV (RRB)<br><br>**ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND DISMISSING PLAINTIFFS' REQUEST FOR PERMANENT RELIEF AND INJUNCTION** |

Appendix D-2

## I. INTRODUCTION

Before the Court are Plaintiffs Robert Hale, Joshua Hale, Nava S. Sunstar, and Butterfly Sunstar (hereinafter collectively referred to as "Plaintiffs") with (1) an Ex Parte Application for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction (Docket No. 2) and (2) a Complaint for Declaratory Injunctive Relief (Docket No. 1). The Court has reviewed the extensive pleadings filed by the parties and has considered the arguments of counsel presented at the hearing in this matter on November 17, 2003.

## II. FACTS

Plaintiffs are the owners and/or leaseholders of certain property located near the town of McCarthy, Alaska. Plaintiffs' property is surrounded by the Wrangell-St. Elias National Park and Preserve (hereinafter the "Park"). Plaintiffs' property was privately owned for many years prior to the creation of the Park in 1980. Plaintiffs' property was at one time connected to the Alaska road system by the McCarthy-Green Butte Road, which provided valid and legal access rights to the property in question for many years. However, whether valid and legal access existed at the time that the Park was created is in dispute.

The McCarthy-Green Butte Road is a roughly thirteen (13) mile long trail that leads from Plaintiffs' property to the town of McCarthy and passes through the Park. This road, however, has not been used for vehicular travel for many years and has fallen into disrepair. For example, the bridges crossing McCarthy Creek are now gone and vegetation covers much of the roadway. The only vehicles that could possibly traverse the road today are four-wheel drive vehicles, tracked vehicles, and/or snow machines. The Alaska Road Commission listed the road as "abandoned" in 1938. There is little evidence that

anyone has sought to maintain the road or has successfully driven a motor vehicle on it since.

Plaintiffs obtained the property in question in the Spring of 2002 and have, on occasion, utilized the McCarthy-Green Butte Road, in one fashion or another, to access their property from the town of McCarthy. Until recently, the primary method used by Plaintiffs on the trail has been horseback, although a tracked vehicle was apparently utilized as well.

In the Spring of 2003, Plaintiffs' house burned to the ground and Plaintiffs began efforts to rebuild. In order to bring new supplies in via the McCarthy-Green Butte Road, they began using a tracked vehicle, a D-4 Caterpillar. Shortly thereafter, Plaintiffs were advised by representatives of the Park Service that they could not use the aforementioned tracked vehicle on the McCarthy-Green Butte Road. On April 8, 2003, a Public Notice was posted near the roadway prohibiting the use of any motorized vehicles on the road other than snow machines. In August of 2003, Plaintiffs sought Park Service permission to utilize a motorized tracked vehicle in order to bring supplies into their property. The Park Service refused to give Plaintiffs permission for this, on either a temporary or permanent basis, although it attempted to work with Plaintiffs and expedite the permitting process at no cost.

It is the Park Service's position that an environmental assessment and route study must be conducted before it can act upon Plaintiffs' request to utilize motorized tracked vehicles on the McCarthy-Greene Butte Road. Plaintiffs contend that they are not required to obtain a permit or Park Service permission before upgrading and utilizing the route in question.

The Park Service has also notified Plaintiffs that they cannot utilize a tunnel that is on Park land, which tunnel leads

to an underground mine owned by Plaintiffs. Although this is a separate issue, it is addressed below as well.

## III. DISCUSSION

Several issues are raised in this matter. The first issue is whether Defendants can regulate right of access over federal conservation lands when the right of access existed before the creation of the conservation unit. Included within this issue is the question of whether or not a right of access, which was at one time valid, can be abandoned and, if so, whether it was abandoned in this instance. More specifically, the ultimate question is whether or not Plaintiffs must obtain a license and/or a permit to utilize a motorized tracked vehicle on the McCarthy-Green Butte Road in order to access their property which is located within the Park. Although this has been described by some as a "landmark" dispute, it is not. As set forth below, the matter has been previously litigated and resolved in this Circuit.

The second issue is whether Defendants can prohibit Plaintiffs from entering a mine tunnel on Park land which leads underground to Plaintiffs' mine but has been closed by the Park Service for safety reasons.

This dispute would have never likely arisen prior to 1980 and the enactment of the Alaska National Interest Lands Conservation Act (ANILCA). Prior to this time, the land in question was subject to few restrictions and was utilized freely for mining, subsistence, and recreational purposes. ANILCA changed this, and for reasons clearly articulated by Congress, a large portion of land within Alaska was placed into conservation units, i.e., national forests, parks, wildlife refuges, and wild and scenic rivers. From the outset, concern existed regarding how this dramatic change in land classification would impact those with vested rights in and/or around the

conservation units and those who customarily used the land in question. The challenge for Congress was to balance the interests of private property owners, as well as subsistence and recreational users, against the need to safeguard and regulate federal land and wildlife. With this in mind, considerable discussion, debate, and compromise preceded the enactment of ANILCA. The hope was to once and for all resolve the conflicts that this proposed legislation created and to preserve forever much of Alaska's pristine wilderness, while not significantly compromising the lifestyle of those who resided there, who pioneered the land, and who contributed to its unique and colorful character. The legislation that ensued lies at the center of the current dispute.

### A. Valid Rights of Access That Existed Prior to ANILCA Were Not Significantly Restricted By ANILCA.

Interestingly, one of the issues which is debated here was not the subject of any debate preceding the adoption of ANILCA by Congress. The Congressional Record suggests that legislators presumed existing rights of access, or right-of-ways, would not be impacted by ANILCA and only discussed the issue in passing. Their views were explicitly set forth in the resulting legislation, i.e., 16 U.S.C. §§ 3101 to 3233.

More specifically, 16 U.S.C. § 3129 provides: "Valid existing right of access[.] Nothing in this subchapter shall be construed to adversely affect any valid existing right of access." This provision was adopted both by the House of Representatives (H.R. Rep. No. 96-97, pt. 2, at 66 & 206 (1979)) and the United States Senate (S. Rep. No. 96-413, at 67 & 300 (1979)) and remained intact after numerous committee conferences. The provision itself is clear and unambiguous and stands alone in its expression of Congressional intent.

The Court notes that Congress engaged in considerable debate concerning access rights by in-holders who did not have a valid existing right of access to their property when ANILCA was adopted. This was codified in 16 U.S.C. § 3170 and was the subject of extensive discussion. Of note, during these discussions, and on August 1, 1978, Alaska Senator Ted Stevens specifically addressed the issue here raised concerning existing access rights.

> Senator Stevens: Mr. Chairman, again the problem is understanding it. If you will permit me – in some of these areas, as I mentioned, there are existing accesses, existing roads that have been used, existing airports.
>
> They are going now to be placed into parks and perhaps wilderness areas. This says the Secretary can grant temporary access when he determines such access will not result in permanent harm to the resources of such units.
>
> Now, I wonder about that in terms of again the existing level of access and what is going to happen to that. Are we going to be able to use those roads?
>
> * * *
>
> Does this mean, Mr. Quarles, that permanent harm to the resources – does that mean that the existing uses would be foreclosed for such purposes?

Mr. Quarles: No. I don't read it that way at all, sir.[1]

Later that day Senator Stevens sought to again clarify the issue when addressing Senator Jackson, the Chairman of the United States Senate Committee on Energy and Natural Resources, while discussing the issue of temporary access across federal lands.

> Senator Stevens: I want to make sure you are not foreclosing the existing permanent access.
>
> The Chairman: We are enlarging it. The key situation here, the word is temporary. It is for surveys, geographical, exploratory or other temporary uses. It deals only with those special situations, as I understand it.[2]

Finally, in order to make it absolutely clear that ANILCA would not eradicate and/or seriously compromise existing right-of-ways, Senator Stevens, on the floor of the United States Senate on August 18, 1980, engaged in the following brief colloquy with Senator Jackson:

> Mr. Stevens: I would like to clarify a point regarding valid existing rights. The designation of conservation system units are subject to valid existing rights and use of such rights subject to reasonable regulation, shall be permitted. It is my understanding that valid

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[1] Alaska National Interest Lands Conservation Act of 1980: Alaska (d)(2) Lands – Mark up Before the Senate Energy and Natural Resource Comm. 95th Cong. 75-76 (August 1, 1978) (statements of Senator Stevens, Member, Senate Comm. Energy and Natural Resources; and, Mr. Quarles).

[2] Id. at 78.

> existing rights do include any valid existing rights of way or rights of way which are created in the future.
>
> Mr. Jackson: The Senator is correct. The designation of units of this bill are subject to valid existing rights and the use thereof, subject to reasonable regulation.[3]

The Court was unable to locate any part of the Congressional Record, following an extensive search of the committee hearing notes, the numerous commentaries contained in the compilation of legislative history, and the debate on the floors of both the House of Representatives and the Senate, that indicated congressional intent different from that expressed by Mr. Quarles and/or Senator Jackson to Senator Stevens, and set forth specifically in 16 U.S.C. § 3169. Consequently, the Court concludes ANILCA was not to prohibit any valid right of access that existed at the time it was enacted, although such rights of access were subject to reasonable regulation.

**B. Even If A Valid Access Right Exists, It Is Subject To Reasonable Regulation.**

Controlling case law,[4] which is binding upon this Court, as well as Senator Stevens' comments on the Senate floor,[5] suggest that, despite valid existing rights of access, the

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[3] 126 Cong. Rec. S11, 195-96 (daily ed. Aug. 19, 1990) (statements of Senators Stevens and Jackson).

[4] See U.S. v. Vogler, 859 F.2d 638, 642 (9th Cir. 1988), wherein the Ninth Circuit determined, "[t]he Secretary's power to regulate within a national park to 'conserve the scenery and nature and historic objects and wildlife there . . .' applies with equal force to regulating an established right of way within the park."

[5] Supra note 3.

Secretary of the Interior (hereinafter the "Secretary") has the authority to reasonably regulate access routes that pass through Park property. This is largely because the land underlying and surrounding the access routes is Park land, and because one of the overriding purposes of ANILCA was to preserve and protect Park land.[6] However, what constitutes "reasonable regulation," in light of the clear mandate to protect valid existing rights of access, remains the subject of dispute.

"Reasonable regulation" might include, among other things, the prohibition of uses that would damage land outside the right-of-way, or it might prohibit uses that would alter or upgrade the roadway from the way it existed in December of 1980 when the Park was created. "Reasonable regulation" may even require an environmental assessment when the access route in question is being reactivated after years of non-use and natural deterioration. And "reasonable regulation" can include a permitting process to enforce reasonable regulations so long as the permitting process is itself reasonable, not unnecessarily restrictive, and consistent with the Congressional mandate favoring access. Therefore, even if a valid right of access existed at the time Plaintiffs acquired the property in question, the Court concludes the Park Service may require Plaintiffs to seek a permit prior to re-opening a roadway that has long since been inactive.[7]

Moreover, even though the declarations submitted by Plaintiffs' expert, Raymond A. Kreig (Docket No. 26), are impressive and should be considered by the Park Service in evaluating Plaintiffs' access request, they do not dispose of the issue. If it were clear that, in addition to Mr. Kreig's findings,

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[6] 16 U.S.C. § 3101.

[7] Vogler, 859 F.2d at 642.

the access route in question existed at the time ANILCA was enacted, had not been subsequently abandoned, followed the same route as it historically did, is in roughly the same condition as it was at the time of ANILCA, and is sought to be used in the same manner as it was capable of being used in 1980, Plaintiffs' arguments may have merit and any permitting process would likely only need to be perfunctory. However, to utilize this route today, Plaintiffs must cross streams that were originally spanned by bridges, must apparently travel outside the right-of-way in certain places, and must, in some instances, create new sections of roadway. They must essentially open up a road that has been overgrown and abandoned for more than 65 years. This type of activity would naturally be of concern to the Park Service and would justify a reasonable investigation and/or a permitting process whether access rights existed or not. Therefore, the Park Service was justified in asking the questions it did and in seeking input concerning Plaintiffs' activities on the roadway. Consequently, the Court concludes the Park Service is entitled, within the scope of 16 U.S.C. § 3169, to require Plaintiffs to obtain a permit before utilizing the roadway in dispute.

### C. If Plaintiffs Lack Valid Rights Of Access Pursuant To 16 U.S.C. § 3169, They Are Still Entitled To Access To In-holdings Subject To Reasonable Regulation.

There is no question that Plaintiffs are "in-holders" in the sense that they own property that is surrounded by Park land. Therefore, without a valid right of access under 16 U.S.C. § 3169, they are limited to the protections of 16 U.S.C. § 3170, which permits the use of snow machines, motorboats, airplanes, and non-motorized surface transportation. These rights may not

be restricted without first providing notice and a "hearing in the vicinity of the affected unit of area."[8]

As "in-holders," Plaintiffs are also entitled to such rights as are "necessary to assure adequate and feasible access" to their property.[9] These additional rights are again "subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands."[10] Herein lies much of the present dispute.

Plaintiffs believe that "adequate and feasible access" to their property should permit them to utilize the old McCarthy-Green Butte Road, to deviate therefrom when necessary, to utilize a tracked vehicle to do so, to ford streams where bridges used to be, and to do so without permission or permit. Defendants appear to question Plaintiffs' entitlement to these rights, but have not foreclosed anything at this time. Defendants contend that, in any event, a permit is required, thereby necessitating a study of the impact of Plaintiffs' proposed uses.

Once again, it is clear that if the secretary has the authority to regulate the manner and means of access, as is provided hereby statue [sic], then the Secretary, via the Park Service, has the authority to require permits before allowing use of an access route. Therefore, the Court concludes Plaintiffs must obtain a permit whether proceeding under 16 U.S.C. § 3169 or 16 U.S.C. § 3170.

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[8] 16 U.S.C. § 3170(a).

[9] 16 U.S.C. § 3170(b).

[10] Id.

This does not necessarily mean that Plaintiffs will be prevented from accessing their property as they seek to do. It simply means that the Park Service is entitled to first evaluate their request and consider the impact it will have on the Park. The Park Service will then, after considering all relevant factors, issue a document outlining the means and manner of access it permits. If Plaintiffs are dissatisfied with the Park Service's decision, they can appeal it to this Court.

**D. The Court Lacks Jurisdiction To Address Issues Relating To The Permits, Under The Administrative Procedure Act, Until After The Permit Process Has Been Completed.**

The jurisdiction of the U.S. District Court is limited and specific.[11] Without jurisdiction the Court cannot act.[12] In the present case, it is clear that Plaintiffs must seek a permit to use the roadway in question, regardless of the nature of their access rights. Consequently, the Park Service is entitled to investigate the matter and make a reasoned determination. Once a final decision is made, Plaintiffs may appeal the same, should they choose to do so. However, before this process is completed, the Court lacks jurisdiction over the Plaintiffs' claims.[13]

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[11] See Insurance Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694, 701 (1982).

[12] Clow v. U.S. Dept. of Housing and Urban Development, 948 F.2d 614, 625 (9th Cir. 1991) abrogated on other grounds by 523 U.S. 83 (1998).

[13] The Administrative Procedure Act provides in relevant part: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to

(continued...)

**E. The Motion For Temporary Restraining Order Is Denied As Plaintiffs Have Failed to demonstrate A Probability Of Success On The Merits And/Or Irreparable Injury.**

Given the lack of jurisdiction, the current posture of the case, the successful efforts Plaintiffs have made to supply themselves for the winter, and the fact that this matter was brought to the Court's attention at such a late date, the Court hereby **DENIES** Plaintiffs' Request for Temporary Restraining Order (Docket No. 2). This dispute must be adjudicated pursuant to the Administrative Procedures Act (APA) and brought before the U.S. District Court once a final decision has been entered.[14]

As the Court previously indicated, vehicular travel over the roadway in question has not occurred for more than 65 years. This was not a secret at the time Plaintiffs purchased the property, as many living within the Park boundaries lack vehicular access to their property. Therefore, it is reasonable to allow the Park Service time to investigate the issue before making a decision. Plaintiffs' lifestyle will not be significantly impacted by any delay involved, as there is no reason for them to have expected that access existed when they purchased the property in question.

By the same token, the tunnel which Plaintiffs wish to enter, Polk Adit 1601, has been unused for many years and

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[13] (...continued)
judicial review." 5 U.S.C. § 704 (emphasis added). Consequently, because the Park Service has yet to make a "final agency action," the court determines it lacks jurisdiction over Plaintiff's claims.

[14] Id.

there is no urgency at the present time that would justify a temporary restraining order. This tunnel is the property of the Park Service and is located entirely on Park land. Moreover, the safety issues the Park Service raises do not appear to be unreasonable upon their face. Plaintiffs can, nevertheless, seek an appropriate permit to utilize the tunnel in question and can appeal any final decision entered.

## IV. CONCLUSION

The Court greatly appreciates the desire of Alaskans to access the lands that surround them and can personally recall the turmoil and agony of the '60s and '70s, as these sensitive issues were debated both locally and throughout the Nation. The Court also understands the wilderness lifestyle and the need to reasonably balance environmental concerns with human needs. However, more than anything else, the Court appreciates the rule-of-law. The Court has no option but to follow the law as enacted by Congress and established in this Circuit. For the Court to grant Plaintiffs' request, it would have to ignore U.S. v. Vogler, 859 F.2d 638 (9th Cir. 1988), which case is directly on point and controlling in this matter. More specifically, both the Vogler decision and ANILCA authorize the Park Service to require a permit for motorized travel on Park land and subject the traveler to reasonable regulation.[15] Furthermore, the APA precludes the Court from acting until after the Park Service has ruled upon Plaintiffs' permit application, according to its established procedures.[16]

Finally, the facts of this case do not justify the issuance of a temporary restraining order, as it is not clear that Plaintiffs will ultimately prevail in this matter, although the Court notes

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[15] Vogler, 859 F.2d at 642.

[16] Supra note 13.

that they may well be granted some form of motorized access to their property. Plaintiffs have long since been aware of the Park Services's position with regard to access. Consequently, the Court determines Plaintiffs will not be irreparably harmed by adhering to Park Service rules until the matter is finally resolved.

**The Court expects that, henceforth, as the parties continue to address these issues through the permitting process, they will each respect the other and will communicate openly and candidly. The showmanship and emotionalism that have characterized their interactions in the past must cease. After all, they are neighbors. The ultimate resolution of this case will be based solely on a fair application of applicable law.**

Therefore, for the reasons stated herein, Plaintiffs' Ex Parte Application for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction (Docket No. 2) is hereby **DENIED**, and Plaintiffs' Complaint for Declaratory and Injunctive Relief (Docket No. 1) is hereby **DISMISSED** for lack of jurisdiction.

ENTERED at Anchorage, Alaska, this 18th day of November, 2003.

/s/ Ralph R. Beistline
RALPH R. BEISTLINE

UNITED STATES DISTRICT JUDGE

Appendix E-1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

| | | |
|---|---|---|
| ROBERT HALE, JOSHUA HALE, NAVA S. SUNSTAR, AND BUTTERFLY SUNSTAR,<br><br>Plaintiffs,<br><br>vs.<br><br>GALE NORTON, Secretary of the Interior; GARY CANDELARIA, Superintendent, Wrangell-St. Elias National Park and Preserve; HUNTER SHARP, Chief Ranger, Wrangell-St. Elias National Park and Preserve; DEPARTMENT OF THE INTERIOR; NATIONAL PARK SERVICE; FRAN MAINELLA, Director of the National Park Service; MARCIA BLASZAK, Acting Regional Director of the National Park Service, all in their official capacities,<br><br>Defendants. | ) | Case No. A03 0257 CV (RRB)<br><br>ORDER DENYING PLAINTIFFS' MOTION RE RECONSIDERATION |

Before the Court is Plaintiffs' Motion for Reconsideration (Docket 29). Plaintiffs have supplied the Court with additional evidence, including photographs and declarations, and have taken issue with the Court's findings and conclusions entered in its Order of November 18, 2003. The Court, nevertheless,

after review of all the pleadings filed to date, reaffirms its previous decision in this matter.

It is important that the parties not read more into the Court's Order than is there. Both seem to have done so. The Court recognizes the access rights provided by ANILCA and believes that they must be acknowledged and respected, subject to reasonable regulation. Congressional intent and subsequent case law make it clear, however, that the regulator is the Park Service and not the in-holders. If the Park Service abuses its discretion with regard to the permitting process, Plaintiffs may seek redress in the courts.

The Court will clarify and briefly summarize its findings and conclusions in this matter.

1. The Plaintiffs, by virtue of their ownership of property surrounded by the Wrangell-St. Elias National Park (the "Park"). have certain rights of access to their property which were guaranteed by ANILCA when the Park was created.

2. Plaintiffs' access rights, whether under 16 U.S.C. § 3169 or 16 U.S.C. § 3170, are subject to reasonable regulation by the Park Service.

3. Reasonable regulation includes the right to establish a permitting process for motorized land travel within the Park. U.S. v. Vogler, 859 F.2d 638 (9th Cir. 1988). The Court is well aware of both the distinctions and similarities between the Vogler case and this one. Vogler, however, stands for the proposition that reasonable regulation includes the right of the Park Service, in its discretion, to require persons desiring to use motorized land vehicles (other than snow machines) within the Park to first obtain a permit.

4. The access route that Plaintiffs now seek to re-open and utilize did, at one time, provide vehicular access to Plaintiff's property. This route, however, has fallen into disrepair and has not been used is its customary fashion for decades. Whether the

last truck traveled it 30 years ago or 65 years ago is of little significance, for the roadway itself has degenerated significantly since ANILCA was enacted and is now better characterized as a trail. Plaintiffs admit that the most practical means of utilizing the route currently is by bulldozer, although four-wheel drive and/or all-terrain vehicles would likely be able to traverse the trail during certain times of the year.

5. Clearly within the Park Service's regulatory function is the requirement for reasonableness. This includes the obligation to expeditiously address and fairly resolve permit applications, and to recognize that, at least as it applies to this portion of the Park, people are part of the environment. To date, it appears that the Park Service has been reasonable in its efforts to deal with Plaintiffs and in its desire to fairly regulate the manner and means of motorized access Plaintiffs seek. The Court would be quick to say so if it felt otherwise. The challenge has been Plaintiffs' lack of cooperation.

6. Whether the Park Service is required to follow the National Environmental Policy Act (NEPA) has not been fully briefed by the parties or addressed by the Court. However, if the Park Service, in good faith, believes that a NEPA study is needed and can be performed in a reasonably expeditious fashion, such a study may well be appropriate regardless of whether it is mandated by law.

7. On the other hand, there is evidence in the record to suggest that much, if not all, of the access route in question is on stable ground and can be used, with reasonable regulation, without significantly injuring the surrounding terrain. The Court has yet to visit the site and cannot therefore render a personal opinion with regard to the reasonableness of various modes of travel. There may be a number of options that would provide Plaintiffs with reasonable and adequate motorized access to their property without significantly compromising Park Service interests. The issue here is—who is in charge?

Plaintiffs believe that it is for them to determine what is appropriate access, unfettered by the Park Service. The law, however, requires the Park Service to reasonably regulate access routes within the Park.

8. Property owners seeking access rights within the Park have an implicit obligation to be reasonable as well. Plaintiffs' confrontational attitude, their refusal to read Park Service letters and/or their return of Park Service letters unopened, Plaintiffs' refusal to speak with Park Service representatives who attempted to communicate with them in person, and Plaintiffs' occasional efforts to intimidate Park Service employees, were not reasonable and have served only to delay resolution of this matter and make the Park Service's task more difficult. Plaintiffs' expectation that they alone can regulate their activities within the Park is unreasonable. Plaintiffs' efforts to forego Park Service regulation by directly bringing this matter to the Court prematurely is unreasonable as well.

9. It is highly unlikely that Plaintiffs will prevail on their claim to use a tracked vehicle on the McCarthy Green Butte Road without first obtaining Park Service approval. Given the clear precedent of Vogler, the subject is not "fair ground for litigation."

10. The "hardships" experienced by Plaintiffs as a result of the delay associated with obtaining a permit, when viewed in the context of "bush living" in Alaska, are not so substantial or unexpected that an exception to the permitting process or the entry of an injunction is justified. Many Alaskans who choose a wilderness lifestyle routinely experience similar hardships, without the benefit of a large scale air lift of goods. This is verified not only by affidavits submitted on behalf of Defendants, but is common knowledge in the State. In this case, the fire that created the hardship occurred in April but the lawsuit was not filed until November 3, 2003. Plaintiffs cannot avoid the permitting process by failing to timely act.

Furthermore, the Plaintiffs have been able to freely travel to and from their property within the Park and have chosen to spend the winter there. Additionally, there is evidence in the record that a substantial amount of goods was delivered to the property by air prior to winter.[1]

11. The Court cannot be any clearer regarding its interpretation of the law. Plaintiffs must follow established Park Service rules and seek a permit to utilize the access route in question. The Park Service must be given reasonable time to evaluate and rule upon the permit application. Once a final ruling has been entered, the matter becomes ripe for Court review pursuant to 5 U.S.C. § 702 et seq. Until that time, the Court lacks jurisdiction to proceed or interfere with the administrative process. Plaintiffs' request for an emergency permit made on August 30, 2003, does not satisfy this requirement, for no final order has been entered by the Park Service with regard to Plaintiffs' request to use a tracked vehicle on the McCarthy-Green Butte Road.

In its prior Order (Docket 27), the Court suggested that the best way to resolve this dispute was for the parties to communicate in good faith and respect one another's needs and concerns. This continues to be the case. If it is Plaintiffs' desire to continue the battle, the appellate process is very much available to them. If, on the other hand, they wish to obtain some form of motorized access to their property in the reasonably near future, there is a permit process that they can pursue.

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[1] The Court has not relied on newspaper accounts for any of its findings in this matter.

ENTERED at Anchorage, Alaska, this 15 day of December, 2003.

/s/ Ralph R. Beistline
RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

Appendix F-1

Form 10-114
Rev. Dec. 00

**UNITED STATES DEPARTMENT OF THE INTERIOR**
**National Park Service**

**Special Use Permit**

Name of Use Temporary Access Permit Reviewed 3/12/2004
Permit Expires 4/15/2005

Long Term ____ Permit # –ARO–WRST–9500-HO23
Region–park—T ype [sic]–No.#

Short Term x Wrangell-St. Elias National Park and Preserve
Name of Area

| Butterfly Sunstar, Navar S. Sunstar and Joshua Hale | PO Box MXY, Glennallen, Alaska 99588 |
|---|---|
| Name or Permittees | Address |

**Is hereby authorized from the date of signature through April 15, 2004 and from October20, 2004 through 1 year from the date of the signature or April 15, 2005, which ever comes first, to use the following described land or facilities in the above named area:**

The proposed access would follow an approximately 14-mile long bladed alignment between the town of McCarthy and their home site at Marvelous Millsite (USMS 1082-B), and Spokane Placer (USMS 875) with about 12.5 miles of the route on preserve lands.

**For the purpose(s) of**: Temporary access to two inholdings on McCarthy Creek in the Wrangell-Saint Elias National Preserve. The Permittees wish to transfer food, building supplies, and fuel

to their inholding using a bulldozer (with blade generally up) and towing a trailer.

**Authorizing legislation or other authority (Re - DO-53): Title 43 CFR 36.12**

NEPA Compliance: CATEGORICALLY EXCLUDED ___
EA/FONSI x EIS ___ OTHER APPROVED PLANS

PERFORMANCE BOND: Required __ Not Required__x
Amount $0.00
LIABILITY INSURANCE: Required ___ Not Required_x
Amount $0.00

ISSUANCE of this permit is subject to the conditions on the reverse hereof and appended pages and when appropriate to the payment of the U.S. Dept. of the Interior, National Park Service (NPS) of the sum of $ 0.00

The undersigned hereby accepts this permit subject to the terms, covenants, obligations, and reservations, expressed or implied herein.

Permittee _____, _____, _____
Signature Name Date

Permittee _____, _____, _____
Signature Name Date

Permittee _____, _____, _____
Signature Name Date

Authorizing Official _____, _____, _____
Signature Superintendent Date

Appendix F-3

## GENERAL
## CONDITIONS OF THIS PERMIT

1. The Permittees shall exercise this privilege subject to the supervision of the Superintendent, and shall comply with all applicable laws and regulations of the area.

2. Damages - The Permittees shall pay the United States for any damage resulting from this use which would not reasonably be inherent in the use which the Permittees is authorized to make of the land described in this permit.

3. Benefit - No Member of Congress shall be admitted to any share or part of this permit or to any benefit that may arise therefrom: but this provision shall not be construed to extend to this grant if made with a corporation for its general benefit.

4. Assignment - This permit may not be transferred or assigned without the consent of the Superintendent, in writing.

5. Revocation - This permit may be terminated upon breach of any of the conditions herein or at the discretion of the Superintendent.

6. The Permittees is prohibited from giving false information; to do so will be considered a breach of conditions and be grounds for revocation [Re: 36 CFR 2.32(a)(4)].

7. Permittees will comply with applicable public health and sanitation standards and codes.

Appendix F-4

## SPECIFIC CONDITIONS OF THIS PERMIT

1. A D-5 Caterpillar or smaller bulldozer pulling a trailer is the only vehicle authorized by this permit. Prior approval by the Superintendent is required if the Permittees want to substitute a comparable vehicle. This permit does not affect Permittees' use of snowmachines (during periods of adequate snow cover), fixed wing aircraft, horse or foot for access.

2. Travel pursuant to this permit is authorized from the date of permit issuance through April 15, 2004; and from October 20, 2004 until either April 15, 2005 or the expiration of the permit (whichever comes first). Travel during the above identified periods is further conditioned upon the ground being frozen to a minimum depth of 6 inches and the existence of snow cover sufficient to protect the resources, typically more than 6 inches of snow. Stream crossings will utilize ice or snow bridges; these bridges must be strong enough to support permitted vehicles. Open water crossings require advance approval by the Superintendent or designee.

3. Before commencing access, the Permittees will obtain all necessary State of Alaska permits and U.S. Army Corps of Engineers permits. This permit does not authorize travel across private land. Permittees are responsible for securing permission to cross private land.

4. The Permittees shall notify the Superintendent 48 hours prior to the start of each trip. However, if after one or more trips are completed, and the site conditions still allow for access to proceed, this stipulation may be modified by the Superintendent.

5. A maximum of 18 one way trips by bulldozer, with or without a trailer, are permitted.

6. The Permittees and the NPS will jointly conduct a reconnaissance along the proposed alignment to identify and to determine how to avoid problem areas before a bulldozer is moved across the selected alignment. The Superintendent or his designees may accompany the Permittees on any or all trips to insure permit compliance and direct alignment selection.

7. The Permittees are responsible for ensuring that all employees, party members, operators, and any other persons working for or with the Permittees comply with the permit.

8. The bulldozer will travel with the blade up, except as necessary to build snow bridges at sites approved by the Superintendent. In addition, two sections of the alignment, where material has slumped onto it, would likely need to be bladed again: 1) near the upper tunnel bypass, and 2) along the riverbank approximately one mile south of Marvelous Millsite. At the upper tunnel bypass, blading of soils would be within the existing disturbance, including side-cast. Other short sections of

previously bladed side slopes or slopes, with recent cut and fill, may be bladed with advance approval by the Superintendent or designee.

9. Standing live trees with a diameter breast height (DBH) greater than 3 inches shall not be cut or cleared without advance approval by the Superintendent or designee. No trees, regardless of size, within 300 feet of a water body may be cut or cleared without advance approval by the Superintendent.

10. The use of motorized vehicles to push, blade, or drag trees is not allowed under this permit. Removal of downed trees shall be by cutting the trees into lengths and placing them by hand lengthwise and parallel to the alignment.

11. Bulldozer operators will not execute tight turns by locking one track, without advance approval by the Superintendent or designee.

12. Debris, food and refuse generated by the Permittees and/or employees and coworkers will be removed from the Preserve and disposed of in accordance with State and Federal law.

13. Any equipment which breaks down or becomes stuck (i.e., cannot be extricated by means of immediately available resources) during access will be reported as soon as possible to the Superintendent or designees. Equipment must be removed or stabilized in consultation with the NPS.

Cultural Resources

14. The Permittees shall not injure, alter, destroy, or collect any cultural resource site, structure, or object. Examples of cultural resources within the area of potential effect are mining camps, road construction camps, isolated cabins, tunnels, remains of bridge abutments, and associated features and artifacts.

15. If a cultural resources are impacted by the permitted activities, the Permittees shall cease the activity, protect the resources, and notify the Superintendent or designee immediately.

Water Resources

16. A snow ramp or ice bridge must be constructed only of snow and water, and must be substantially free of soil and organic debris. If water is pumped from the creek to make an ice bridge, the intake of the pump hose must be screened to protect fish and their eggs.

17. The Permittees will avoid impeding the passage of fish, disrupt fish spawning, adversely affecting over-wintering or nursery areas identified by the Superintendent or designee. The Permittees shall not permanently block off or change the character or course of any stream.

Fuel Transportation

18. Fuel for the bulldozer can be cached at a single location on NPS land along the access corridor, provided the location of the fuel cache is at least

100 feet from the active stream channel of fish-bearing streams (McCarthy Creek, East Fork McCarthy Creek, Nikolai Creek). The fuel cache capacity is limited to 55 gallons. Secondary containment of cached fuel will be achieved using overpack containers. Advance notification of 48 hours for the proposed fuel cache shall be provided to the NPS for review and approval. Fuel shall not be cached between April 15 and October 20, 2004. Refueling of the bulldozer may be allowed adjacent to fuel caches. When refueling the bulldozer, Permittees must not leave equipment unattended while actively refueling. Absorbent materials will be used while refueling to collect any fuel that may be spilled during the refueling operations. A tarp of other secondary containment must be placed beneath equipment when refueling.

19. Fuel containers larger than 5 gallons in size must be transported within sealed over-pack drums of plastic or steel. Absorbent pads must be kept on the bulldozer while traveling on lands administered by the NPS.

20. Spills of oil, petroleum products, and hazardous substances shall be reported to the Alaska Department of Environmental Conservation (ADEC) in accordance with Alaska law. Concurrent spill notification shall be provided to the park Superintendent or designee at the time notification is provided to ADEC. Discharge notification and reporting requirements from AS 46.03.755 and 18 AAC

75 Article 3 are to be followed by the Permittees. Refer to attachment #1.

Immediate actions will be taken to confine any and all spills on land and water to the smallest area. Any amount of oil or petroleum product spills, either on water or on land must be cleaned up and removed in accordance with ADEC policies and guidelines. Refer to ADEC Clean-up Requirements: as found on ADEC website http://www.state.ak.us/dec/spar/csp/process.htm

The undersigned hereby accepts this permit subject to the terms, covenants, obligations, and reservations, expressed or implied herein.

Permittee _____, _____, _____
Signature Name Date

Permittee _____, _____, _____
Signature Name Date

Permittee _____, _____, _____
Signature Name Date

80

(4)

No. 06-1475

11-6-07

# In the Supreme Court of the United States

JOSHUA HALE, JOSEPH HALE, FKA NAVA S. SUNSTAR, AND ELISHABA HALE, FKA BUTTERFLY SUNSTAR, PETITIONERS

*v.*

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
*Solicitor General*
*Counsel of Record*
RONALD J. TENPAS
*Acting Assistant Attorney General*
TODD S. AAGAARD
*Attorney*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

The Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3101 *et seq.*, directs the Secretary of the Interior to give owners and occupiers of land surrounded by federal lands protected by ANILCA "adequate and feasible access" to their land, "subject to reasonable regulations" issued by the Secretary "to protect the natural and other values of such lands." 16 U.S.C. 3170(b). The question presented is whether, when a landowner requests an access permit from the National Park Service, ANILCA precludes the National Park Service from evaluating the request pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

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# In the Supreme Court of the United States

No. 06-1475

JOSHUA HALE, JOSEPH HALE, FKA NAVA S. SUNSTAR, AND ELISHABA HALE, FKA BUTTERFLY SUNSTAR, PETITIONERS

*v.*

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The second amended opinion of the court of appeals (Pet. App. A1-A12) is reported at 476 F.3d 694. The first amended opinion of the court of appeals (Pet. App. B1-B10) is reported at 461 F.3d 1092. The initial opinion of the court of appeals (Pet. App. C1-C5) is reported at 437 F.3d 892. The opinion and order of the district court (Pet. App. D1-D15) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on February 5, 2007. The petition for a writ of certiorari

was filed on May 4, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioners, who own a parcel of land surrounded by the Wrangell-St. Elias National Park and Preserve in Alaska, challenge the decision of the National Park Service (NPS) to conduct an environmental assessment before permitting petitioners to drive a bulldozer and trailer across Park lands to their property. The district court dismissed petitioners' challenge for lack of jurisdiction. The court of appeals concluded that the district court did have jurisdiction, but that, under the circumstances of this case, the NPS acted reasonably in requiring an environmental assessment.

1. The Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3101 *et seq.*, created several new units of the National Park System, including the Wrangell-St. Elias National Park and Preserve (Park), 16 U.S.C. 410hh(9). The statute authorizes the use of certain forms of transportation on these protected lands, including snow machines, motorboats, airplanes, and nonmotorized surface transportation methods, subject to "reasonable regulations" by the Secretary of the Interior (Secretary). 16 U.S.C. 3170(a). It further authorizes the use of other methods of transportation "where such use is permitted by this Act or other law." *Ibid.*

The statute also confers certain rights of access to owners and occupiers of property surrounded by protected lands. The statute provides:

> Notwithstanding any other provisions of this Act or other law, in any case in which State owned or privately owned land * * * is within or is effectively surrounded by one or more conservation system

> units, * * * the State or private owner or occupier shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land by such State or private owner or occupier and their successors in interest. Such rights shall be subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands.

16 U.S.C. 3170(b).

Department of the Interior (Department) regulations provide that the owner or occupier of an "inholding" who seeks to use a method of access not enumerated in Section 3170(a) must obtain a permit. 43 C.F.R. 36.10(b)-(c). The relevant agency (in this case, the NPS) must then inform the applicant whether the application contains the required information or is deficient. 43 C.F.R. 36.10(d) (incorporating requirements of 43 C.F.R. 36.5(c)(1)-(2)). If the application is deficient, the applicant must furnish any requested additional information within 30 days. 43 C.F.R. 36.5(d). Before issuing a permit, the agency must determine whether an environmental assessment or an environmental impact statement is required. 43 C.F.R. 36.6. To make that determination, the agency applies the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and the Council for Environmental Quality regulations, 40 C.F.R. Pts. 1500-1508. 43 C.F.R. 36.6.

NEPA requires the preparation of an environmental impact statement for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). If an agency's regulations do not require an environmental impact statement, an agency may prepare an environmental assessment to determine

the significance of the effects of a "major Federal action[]." 40 C.F.R. 1501.4, 1508.9. An agency must prepare at least an environmental assessment unless the action falls within a group of activities called "categorical exclusions," which are actions that do "not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. 1507.3(b)(2)(ii), 1508.4.

2. In 2002, petitioners purchased approximately 410 acres of land completely surrounded by the Park. Petitioners' property is connected to the town of McCarthy, Alaska, by the vestiges of a road known as the McCarthy-Green Butte Road (MGB Road). Approximately thirteen miles of the road are located within the Park. In 1938, the Alaska Road Commission listed the road as "abandoned." By the time petitioners purchased the property, the MGB Road's bridges had washed away, and the road itself had become so overgrown that it was little more than a trail. After petitioners purchased their property, their primary use of the trail was on horseback. Pet. App. A3.

In the fall of 2002, petitioners began bulldozing the route where the MGB Road had once been. C.A. E.R. 87-88. The NPS notified petitioners that unpermitted use of a bulldozer along the route was illegal, and posted a public notice stating that the route may not be used for motorized travel other than by snow machine. C.A. E.R. 91, 93; C.A. Supp. E.R. 4-8.

In the spring of 2003, petitioners' house burned down. In July 2003, petitioners' father, Robert Hale,[1] sent an electronic mail message to NPS officials stating that he wanted "a permanent permit to 'dead' head a

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[1] Robert Hale is a plaintiff and was an appellant in the court of appeals, but did not join his children's petition for a writ of certiorari.

bulldozer with a trailer" between McCarthy and petitioners' property. C.A. E.R. 26; Pet. App. A3. Two days later, the Park Superintendent responded by offering to assist petitioners in completing the necessary permit application. C.A. E.R. 26; Pet. App. A3. Petitioners did not respond.

In September 2003, the NPS received from petitioners an "emergency" application for a bulldozer access permit to transfer supplies before "freeze up." Pet. App. A3. Responding promptly by letter, the NPS asked for clarification as to the nature of the "emergency" and for more information about the nature and frequency of the proposed bulldozer use. *Id.* at A4. The NPS also noted that permits "ha[d] been granted in the past for access to inholdings with heavy equipment such as bulldozers during the winter months when the ground is protected by snow of sufficient depth," and that "[t]ravel over unfrozen ground causes significantly more damage." C.A. E.R. 123; Pet. App. A4. The NPS informed petitioners that, because such travel "falls outside of any environmental assessment previously undertaken by the Park," petitioners' permit request would likely require an environmental assessment. *Ibid.*

Robert Hale responded by providing some, but not all, of the information the NPS needed to process petitioners' permit application. Pet. App. A4. The NPS thereafter informed petitioners that their request did not fall within the "emergency exception" to NEPA, see 40 C.F.R. 1506.11, and thus that an environmental assessment would be required. Pet. App. A4. The NPS proposed that it would prepare an environmental assessment and make a decision within nine weeks, even though its regulations allowed nine months, see 43 C.F.R. 36.6(a)(1), and offered to waive the costs of the

environmental assessment process. Pet. App. A4. Petitioners did not respond to the NPS's proposal. They instead filed suit in November 2003, claiming, among other things, that the NPS had deprived them of their statutory right to "adequate and feasible" access to their inholding. *Id.* at A4-A5.

3. On November 18, 2003, the district court dismissed petitioners' challenge for lack of jurisdiction. Pet. App. D1-D15. The court held that the NPS could reasonably require petitioners to obtain a permit prior to driving a bulldozer and trailer over Park lands on the abandoned road. *Id.* at D8-D12. The court then concluded that, because the NPS had not made a final decision on petitioners' permit application, there was no reviewable final agency action for purposes of the Administrative Procedure Act (APA), 5 U.S.C. 701-706. Pet. App. D12, D14-D15.

4. In January 2004, after the district court's decision, and after the NPS received the necessary information from petitioners, the NPS prepared an environmental assessment. C.A. E.R. 205-237. On March 12, 2004, the NPS tendered a permit for petitioners' signature that authorized petitioners to make 18 one-way trips by bulldozer or similar vehicle within a period of approximately one year, subject to certain conditions. Pet. App. F1-F9. Those conditions included "the ground being frozen to a minimum depth of 6 inches and the existence of snow cover sufficient to protect the resources." *Id.* at F4. Petitioners never signed the permit.

5. The court of appeals affirmed the decision of the district court. Pet. App. C1-C5. In a decision dated February 9, 2006, the court of appeals ruled that the district court properly dismissed the suit for lack of jurisdiction. *Id.* at C5.

Petitioners then filed a petition for panel rehearing and rehearing en banc. The panel withdrew its opinion, substituted a new published opinion, and denied the rehearing petition. Pet. App. B1-B10. In the amended opinion, dated August 25, 2006, the panel held that jurisdiction was appropriate under the collateral order doctrine, see *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), because petitioners' claim that their access to their property cannot be made subject to a NEPA analysis would be "effectively lost" if petitioners were made to wait for the outcome of that analysis to prosecute their challenge. Pet. App. B5-B8.

The court held, however, that petitioners' challenge failed on the merits. Citing *United States* v. *Vogler*, 859 F.2d 638 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989), the court concluded that the NPS may reasonably regulate petitioners' use of the MGB Road, even if, as petitioners contended, the road qualifies as a right-of-way. Pet. App. B8-B10. The court further concluded that the Department's regulation incorporating NEPA review into its permit-granting process falls within the scope of "reasonable regulation[]" of inholder rights of access under ANILCA, since such review helps the Department "in fulfilling its statutory duty under ANILCA to balance 'adequate and feasible access' with the protection of 'natural and other values [of the lands].'" *Id.* at B10.

Petitioners filed a petition for a writ of certiorari, No. 06-960 (filed Jan. 5, 2007). On February 5, 2007, while the petition was pending, the court of appeals *sua sponte* issued a second amended opinion. Pet. App. A1-A12. In its second amended opinion, the court of appeals added that, while it saw "no *per se* conflict" between conducting NEPA review and granting ANILCA access,

such a conflict might arise "depending on the nature of the application and the possible time and cost involved in a NEPA review." *Id.* at A11. The court concluded that no such conflict arose in this case, however, because the NPS's decision to conduct an environmental assessment was reasonable given that petitioners' "out-of-the-ordinary request" to make multiple trips with a bulldozer and trailer over an abandoned, overgrown road, before "freeze up," risked substantial harm to the natural environment. *Id.* at A11-A12. The court also noted that, by offering to complete the environmental assessment in nine weeks and without cost to petitioners, the NPS "appears to have done everything it could * * * to facilitate reasonable access to their property." *Id.* at A12.

Following the court's second amended opinion, petitioners withdrew their then-pending petition for a writ of certiorari based on the August 25, 2006 opinion.

## ARGUMENT

The court of appeals' decision is correct, and it does not conflict with any decisions of this Court or of other courts of appeals. This Court's review is therefore not warranted.

1. The court of appeals correctly held that the NPS acted reasonably in requiring an environmental assessment before granting petitioners' "out-of-the-ordinary request" to drive a bulldozer and trailer over Park lands on an abandoned road. Pet. App. A11.

Under ANILCA, the Secretary must give inholders "such rights as may be necessary to assure adequate and feasible access." 16 U.S.C. 3170(b). "Such rights" are, however, "subject to reasonable regulations issued by the Secretary to protect the natural and other values of

[federally protected] lands." *Ibid.*; see also 16 U.S.C. 1 (directing the NPS to "regulate the use" of parks and other protected areas "to conserve the scenery and the natural and historic objects and the wild life therein * * * by such means as will leave them unimpaired for the enjoyment of future generations").

The Department has determined that "reasonable regulation[]" of access under ANILCA is best accomplished through a permitting process that applies NEPA to determine whether an envir .mental assessment or an environmental impact statement is required, and to conduct such analyses in appropriate cases. See 43 C.F.R. 36.6(a), 36.10. That process of environmental review allows the NPS to determine how a given route or method of access might affect protected lands, and to set conditions of access that will minimize harm to National Park resources.

Although petitioners acknowledge that Section 3170(b) allows the NPS to subject their access to reasonable regulations to protect Park lands, petitioners contend that requiring NEPA review necessarily deprives inholders of the "adequate and feasible access" guaranteed by ANILCA "because owners are totally deprived of the statutorily mandated right *during the review*." Pet. 11-12 (emphasis added). Petitioners' contention is without merit. Were petitioners' argument correct, any delay associated with the review of a permit application—whether to conduct NEPA review, to review and evaluate the request, to process the request administratively, or to investigate an application by, for example, verifying an inholder's claim to ownership—would contravene ANILCA by delaying access. This is not the law.

Moreover, as a practical matter, landowners are in most cases able to anticipate their access needs and file a permit application in advance, preventing any disruption in access. When emergency circumstances exist that require immediate action with significant environmental impact, NEPA regulations allow "alternative arrangements." 40 C.F.R. 1506.11. In this case, the NPS determined that petitioners' access request did not fall within the emergency exception, Pet. App. A4, and petitioners have not challenged that determination.

Nor does the record support petitioners' repeated suggestions that, by conducting an environmental assessment, the NPS unreasonably delayed "meaningful access" to petitioners' property. Pet. 14; see also Pet. 6-7, 17-18. The record shows that petitioners themselves delayed filing their application for an access permit, failed to cooperate with the NPS during the review process, and ultimately refused the permit the NPS proffered. Pet. App. A3-A5; see *id.* at A12.

Finally, the court of appeals in this case held that there was "no *per se* conflict" between the application of NEPA and the right of adequate and feasible access under Section 3170(b), but it observed that a conflict could arise in a particular case. Pet. App. A11. In the circumstances of this case, however, it found no such conflict because of the "out-of-the-ordinary" nature of petitioners' request to make repeated trips with a bulldozer and trailer over environmentally sensitive lands. See *ibid.* That case-specific determination raises no issue warranting this Court's review.

2. Petitioners claim (Pet. 14-18) that the court of appeals' decision conflicts with this Court's decisions in *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2004); *United States* v. *Students Challenging*

*Regulatory Agency Procedures*, 412 U.S. 669 (1973) (*SCRAP*); and *Flint Ridge Development Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776 (1976). Petitioners are incorrect. In each of those decisions, the Court held that a particular statutory provision deprived the relevant decisionmaker of the discretion to make decisions based on environmental impact, and was therefore inconsistent with NEPA review. See *Public Citizen*, 541 U.S. at 770 ("[B]ecause [the Federal Motor Carrier Safety Administration (FMCSA)] has no discretion to prevent the entry of Mexican trucks, [it] * * * did not need to consider the environmental effects arising from the entry."); *id.* at 768 ("FMCSA simply lacks the power to act on whatever information might be contained in the [environmental impact statement]."); *Flint Ridge Dev. Co.*, 426 U.S. at 787 ("preparation of an impact statement [under NEPA] is inconsistent with the Secretary's mandatory duties" under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701 *et seq.*, because it would be impossible to comply with both statutes); *SCRAP*, 412 U.S. at 692-698 (NEPA did not give a federal court authority temporarily to suspend railroad rates, where the Interstate Commerce Act, 49 U.S.C. 15(7) (1970), had "clearly taken away" such power).

By contrast, ANILCA—in the same subsection that provides that the Secretary shall give inholders rights to adequate and feasible access—expressly authorizes the Secretary to subject such access across protected lands to "reasonable regulations," in order "to protect the natural and other values of such lands." 16 U.S.C. 3170(b). As the court of appeals recognized, consideration of environmental impact is not just consistent with, but critical to, the proper implementation of that provision of ANILCA. See Pet. App. A11 ("NEPA helps rather than

hinders the NPS in fulfilling its statutory duty under ANILCA.").

3. Petitioners also contend (Pet. 18-21) that the decision below conflicts with the Tenth Circuit's decision in *Southern Utah Wilderness Alliance* v. *BLM*, 425 F.3d 735 (2005) (*SUWA*). Specifically, petitioners point to the Ninth Circuit's conclusion that, even if petitioners had a valid right-of-way over the MGB Road, that right-of-way would not prevent the NPS from imposing reasonable regulations on its use. See Pet. App. A10. Petitioners contend that this conclusion conflicts with the Tenth Circuit's decision that the holder of a valid right-of-way under the Act of July 26, 1866, ch. 262, § 8, 14 Stat. 253 (43 U.S.C. 932 (1970)) (repealed by Federal Land Policy and Management Act of 1976, Pub. L. No. 94-580, § 706(a), 90 Stat. 2793) (R.S. 2477), may maintain the right-of-way according to "the established usage of the route as of the date of repeal of the statute," without obtaining prior federal approval. *SUWA*, 425 F.3d at 746.

Contrary to petitioners' contention, the decision below does not conflict with the Tenth Circuit's decision in *SUWA*. Unlike this case, *SUWA* did not involve application of ANILCA, and thus did not consider the scope of "reasonable regulation[]" under that statute. Moreover, *SUWA* merely stated that counties holding R.S. 2477 rights-of-way can conduct routine maintenance without prior authorization from a federal land management agency; the Tenth Circuit neither addressed nor limited a federal agency's authority to require permits for potentially damaging uses of R.S. 2477 rights-of-way by private persons who use, but do not own, a right-of-way. Finally, contrary to petitioners' characterization (Pet. 20), their access request did not merely seek to continue

established uses of the route. Rather, as the court of appeals observed, "[t]heir request was tantamount to a request to rebuild and reopen the overgrown trail that the 'MGB road' had become in the two thirds of a century since it was abandoned." Pet. App. A11.

4. The court of appeals did not, as petitioners contend (Pet. 21-23), improperly resolve disputed factual issues that should have been litigated in the trial court in the first instance. Rather, the court of appeals properly based its review of the administrative action challenged in this case on the facts in the administrative record, which included the NPS's analysis of the damage that would arise from the access petitioners requested and the availability of alternative, less-damaging access during the winter when the ground was frozen and covered with snow and ice. Pet. App. A4, A11-A12; see, *e.g.*, *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (when reviewing agency action under the APA, "the focal point for judicial review" is the administrative record, not "some new record made initially in the reviewing court").

5. Finally, even if review were otherwise warranted, this case would provide a poor vehicle because, as the district court correctly held, the APA did not authorize review of petitioners' claims in this suit. Pet. App. D15.

The APA provides for review only of "final agency action." 5 U.S.C. 704. Petitioners brought this suit before the NPS had taken "final agency action" on their request for access. An agency's decision to conduct an environmental assessment before taking final action on a matter is not itself a "final agency action"; rather, it is a preliminary determination that may be reviewed only on review of final agency action. If petitioners believed that the NPS was unduly delaying issuance of a permit—whether because of its preparation of an environ-

mental assessment or for some other reason—the proper course would have been an action to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1).

The court of appeals held (Pet. App. A6-A9) that the district court could entertain petitioners' challenge, relying on the collateral order doctrine that has been applied in the distinct context of appellate review of district court decisions under 28 U.S.C. 1291. See *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S, 541, 546 (1949). For a non-final decision to qualify for immediate review under the collateral order doctrine, the decision must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)).

Assuming, *arguendo*, the collateral order doctrine is even applicable to judicial review of agency action, the decision in question—the NPS's decision to conduct NEPA review of petitioners' application for an access permit under ANILCA—does not satisfy the "separability" and "unreviewability" prongs of the doctrine. First, the NPS's decision to conduct NEPA review is not "completely separate" from the merits of the NPS's permitting decision. To the contrary, the two are inextricably related, because the NPS's review under NEPA is an aspect of its decision on the merits. As the court of appeals recognized, Pet. App. A11, the NPS uses the NEPA process to evaluate the impact of, and impose appropriate conditions on, access through the Park.

Accordingly, the NPS's NEPA review is not "collateral" to the substance of an ANILCA access permit.

Second, petitioners could have sought review of the NPS's decision to conduct NEPA review once the NPS took final agency action on petitioners' permit request. In concluding otherwise, the court of appeals reasoned that petitioners' challenge to NEPA review would be "effectively lost" if petitioners had to wait for the NPS to issue a final decision on their permit application, because the procedure that the NPS used in reaching its decision "will likely not be relevant" to review of the ultimate permitting decision. Pet App. A8. If the NPS's NEPA review process were not relevant to the ultimate permitting decision, however, petitioners' complaint would necessarily be limited to any potential delay that might arise from the process. As noted above, the APA provides a separate route of judicial review, apart from the provision for review of final agency action, for unreasonably delayed agency action. 5 U.S.C. 706(1). Thus, there was no need for the court of appeals to fashion a principle patterned after the collateral order doctrine as an exception to the final agency action requirement in order to give petitioners meaningful judicial review of their claim.

Both the final judgment rule and the APA's requirement of final agency action reflect the determination that the coherence and efficiency to be had from waiting for a final decision outweigh the costs of piecemeal review. See *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 878-879 (1994); *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242 (1980); *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). Petitioners were required to await the completion of the permitting process before seeking judicial review. Petitioners thus

were not entitled to relief in the case for that independent reason.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*

RONALD J. TENPAS
*Acting Assistant Attorney General*

TODD S. AAGAARD
*Attorney*

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In the

# Supreme Court of the United States

JOSHUA HALE; et al.,

*Petitioners,*

v.

DIRK KEMPTHORNE, Secretary of the United States Department of Interior; et al.,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES S. BURLING
*Counsel of Record*
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

*Counsel for Petitioners*

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## ARGUMENT

### I

### THE GUARANTEE OF REASONABLE AND FEASIBLE ACCESS UNDER ANILCA CANNOT BE EVISCERATED BY NEPA ANALYSIS, AS DEMONSTRATED BY HOLDINGS OF THIS COURT

The core of Petitioners' argument is that the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101, *et seq.* (ANILCA) as interpreted at 43 C.F.R. § 36.10(b), places a substantive limit on the Park Service's discretion when regulating access to private inholdings, such that NEPA review is proscribed. The government does not dispute the existence of ANILCA's guarantee of "adequate and feasible" access, but it continues to deny that those words have any meaning, relegating the Hale family to NEPA-delayed unsafe dead-of-winter access. This is not what the words of ANILCA say and not what Congress intended when it tried to ameliorate the impacts on Alaskan citizens of a massive expansion of the National Park System in Alaska.

Nor is the Hale family arguing that there can be *no* regulation of access, the government's characterization notwithstanding. Brief for Federal Respondents' in Opposition at 9.[1]

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[1] The government notes that the Hale family "refused the permit the NPS proffered." Opposition brief at 10. What the Park Service offered was a total of 9 round trips from October, 2004, to April, 2005. App. F-4, Permit. Of course, the granting of a limited number of trips during the dead of winter over a steep and icy trail was neither safe, reasonable, or feasible. While the government's further suggestion that there was a "failure to

(continued...)

Under certain circumstances not present here, for example, it might well be reasonable for the Park Service to verify an inholder's claim to ownership or the validity of an unpatented mining claim. But there is no dispute here that the Hales own the subject property. Nor are there any other reasons that would make this a special case warranting review before access.

That ANILCA's guarantee of "adequate and feasible access" proscribes NEPA review is supported by this Court's precedents in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) (*SCRAP*); and *Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976).

The government claims there is no conflict between these decisions and that of the Ninth Circuit below because ANILCA "expressly authorizes the Secretary to subject such access across protected lands to 'reasonable regulations,' in order 'to protect the natural and other values of such lands.'" 16 U.S.C. § 3170(b). Opposition brief at 11.

However, the Secretary's authorization to promulgate reasonable regulations does not

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[1] (...continued)
cooperate" on the part of the Hale family during the NEPA process is inaccurate, it is also beside the point. *See* Opposition Brief at 10. Under ANILCA, the Hale family has a right to access their property in a reasonable manner without the delays attendant to the preparation and review of a NEPA analysis.

countermand the mandatory duty to grant adequate and feasible access:

> ***Notwithstanding any other provisions*** of this Act ***or other law***, . . . the State or private owner or occupier ***shall*** be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes.

16 U.S.C. § 3170(b) (emphasis added). In *Public Citizen* it was a similar lack of discretion that led this Court to hold that access by Mexican trucks could not be conditioned on the preparation of an EIS:

> Importantly, FMCSA has only limited discretion regarding motor vehicle carrier registration: It must grant registration to all domestic or foreign motor carriers that are "willing and able to comply with" the applicable safety, fitness, and financial-responsibility requirements.

*Public Citizen*, 752 U.S. at 758-59. In other words, "it would not, therefore, satisfy NEPA's 'rule of reason' to require an agency to prepare a [NEPA analysis] due to the environmental impact of an action it could not refuse to perform." *Id.* at 769. *Public Citizen,* moreover, dealt with a NEPA-based challenge to the promulgation of regulations. That the Secretary here has the ability to develop regulations does not obviate his duty to grant access.

Nor is the government's assertion that the Secretary may promulgate regulations relevant to the support provided to Petitioners by *SCRAP*. That case plainly notes that NEPA was not intended to repeal by implication any other statute." 412 U.S. at 694.

*Accord, Flint Ridge*, 426 U.S. at 788. That is made obvious here with ANILCA's "notwithstanding . . . any other law" language. 16 U.S.C. § 3170(b). Not only is there no implication that NEPA repeals the later-enacted ANILCA, but ANILCA makes it obvious that ANILCA trumps NEPA when NEPA interferes with the provision of "adequate and feasible access."

Likewise, in *Flint Ridge* this Court found that the impracticality of complying with NEPA's notice and comment requirements within the time limits established by the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701, *et seq.*, meant that NEPA would not be applied. 426 U.S. at 791. Here, the five months it took for the government to conclude its NEPA analysis, *see* Petitioner's Appendix F, combined with the horribly crabbed access permit ultimately offered by the Park Service, demonstrates the irreconcilable conflict between NEPA and ANILCA's guarantee of "adequate and feasible access."[2] Moreover, as here, the Disclosure Act gave the Secretary no discretion—he had to issue the permit. 426 U.S. at 789-90.

In short, the Ninth Circuit's decision upholding the Park Service's decision to delay the Hale family's reasonable request to access their property for five months so that a NEPA review could be conducted is in

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[2] The five months taken here is typical: "Draft environmental impact statements on simple projects prepared by experienced personnel take some three to five months to complete, at least in the Department of the Interior." *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. at 789 n.10. The Park Service, moreover, claims that it can take up to nine months to complete such NEPA analysis. *See* Opposition brief at 5, *citing* 43 C.F.R. § 36.6(a)(1).

stark contrast to this Court's cases holding that NEPA review is not required when such review is inconsistent with other statutes or when the agency lacks discretion to deny the underlying action. These conflicts are in no way minimized by the Secretary's ability to promulgate regulations. Simply put, these conflicts warrant this Court's intervention in order to explain to the Ninth Circuit and the Department of Interior what statutory and practical limits on NEPA actually mean.

## II

## THE FEDERAL GOVERNMENT HAS NO POWER TO DENY THE EXERCISE OF VALID AND EXISTING RIGHTS-OF-WAY ESTABLISHED UNDER PRIOR LAW

Rights of access granted to the states under the Mining Act of 1866, 14 Stat. 253, better known as R.S. 2477 rights-of-way, may not be denied or restricted by the United States, according to the Tenth Circuit's decision in *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 748 (2005) (SUWA). The access road to the Hale family's property is such an R.S. 2477 right-of-way.[3] Respondent suggests that case is inapposite because it did not involve ANILCA. The government misses the point.

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[3] The Ninth Circuit assumed, without deciding, that the road here qualified as a R.S. 2477 right-of-way, App A at A-9, and held that the Park Service could nevertheless regulate the use of the trail. The trial court likewise declined to reach the ultimate question of whether the road here did qualify under R.S. 2477, holding only that its degraded condition warranted regulation. App. D at D-10. This Court is not being asked to take this case in order to decide the status of the road, but only whether, assuming it qualifies under R.S. 2477, the Park Service can severely limit its use.

That the Hale family's access is via an R.S. 2477 right-of-way is an ***additional*** reason, ***independent of*** ANILCA, why the government may not require NEPA compliance prior to utilization of the road.[4] It is a right-of-way that, according to *SUWA*, eliminates the need of advance consultation with the relevant federal land agency if the right-of-way is not to be expanded:

> As long as the Counties act within the existing scope of their rights of way, performing maintenance and repair that preserves the existing state of the road, they have no legal obligation to consult with the BLM.

425 U.S. at 749. If the Hale family were proposing to engage in maintenance of the road, rather than simply traversing it, the Park Service would still be limited in its authority to interfere with that maintenance:

> [W]hen the holder of an R.S. 2477 right of way across federal land proposes to undertake any improvements in the road along its right of way, beyond mere maintenance, it must advise the federal land management agency of that work in advance . . . [to, if necessary], formulate alternatives.

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[4] This point is emphasized by the language of ANILCA that it is "subject to valid existing rights." 16 U.S.C. § 410hh-2. As well-stated in the *Amicus Curiae* Brief of Mountain States Legal Foundation in Support of Petitioners, this means that the Park Service's regulatory powers under ANILCA are "subordinate" and "subservient" to the rights preserved under R.S. 2477. Amicus Brief at 6-9 and 13-14. These rights are, therefore, ***independent of*** rather than ***dependent upon*** ANILCA.

*SUWA*, 425 F.3d at 748. But that is not the case here. What the Hale family sought permission to do was to travel with a tracked vehicle, here a bulldozer with its blade up, not for the purpose of constructing or reconstructing the road, but because that is the only type of vehicle capable of traversing the unmaintained right-of-way with a 16-foot trailer needed to bring in supplies to rebuild their home. As the family was not seeking permission to construct or expand the right-of-way, they were under no obligation to inform the Park Service of their intentions. The clear conflict between the decision below and that of the Tenth Circuit is another independent reason why the Petition for Writ of Certiorari should be granted.[5]

## III

## THE NINTH CIRCUIT INAPPROPRIATELY REACHED INDEPENDENT FACTUAL CONCLUSIONS THAT THE TRIAL COURT EXPRESSLY ESCHEWED FROM REACHING BECAUSE THERE HAD BEEN NO TRIAL ON THE FACTS

As explained in the Petition, the Ninth Circuit based its decision on certain factual conclusions that it reached without the benefit of a trial and after the trial court expressly declined to address those factual issues. *See* Petition at 21-23. The government responds only by saying that the Ninth Circuit based its decision on "facts in the administrative record."

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[5] The government does not respond to the additional points raised by amicus Mountain States Legal Foundation suggesting that the Ninth Circuit's decision threatens a whole panoply of established rights. That is unfortunate, for those arguments are compelling.

Opposition brief at 13. The problem with this response is that the government does not and cannot cite to anything in the administrative record that was relied upon by the Ninth Circuit when it found that the access sought by the Hale family would cause "more environmental damage" or determined that the argument that it is "more dangerous to drive in the winter—makes no sense to those experienced with conditions in Alaska."[6] The Ninth Circuit did not cite to the administrative record for these off-the-cuff *sua sponte* factual conclusions. Petitioners respectfully submit that the Ninth Circuit cannot base its decisions on factual conclusions not reached or considered by the trial court.[7]

## IV

## THE NINTH CIRCUIT WAS CORRECT IN FINDING JURISDICTION TO REVIEW PETITIONERS' CLAIMS

The District Court and the Ninth Circuit initially held that the courts were without jurisdiction to hear the Petitioners' claims.[8] The Ninth Circuit, however, on reconsideration reversed itself and found that it had

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[6] *See* App. at A-11 to A-12.

[7] Petitioners reemphasize that they are ***not*** asking this Court to evaluate these factual findings but only that it require the Ninth Circuit to base its findings on factual determinations that are not made in the first instance by the trial court.

[8] *See* App. C, Ninth Circuit decision of February 9, 2006, at C-5 and App. D, Order Denying Plaintiffs' Motion for a Temporary Restraining Order and Dismissing Plaintiffs' Request for Permanent Injunctive Relief, at D-15 (dismissing for lack of jurisdiction).

jurisdiction.[9] The Government argues now that the courts had no jurisdiction to review the Park Service's decision to require NEPA analysis prior to allowing access into the Park.[10] This argument is without merit.

The Hale family is not challenging the particularities of the permit process below, but of the very right of the Park Service to impose the NEPA review process in the first place.[11] As the Court below recognized, this argument "falls squarely within the collateral order doctrine."[12] The government makes the semantically challenging argument that the decision to do a NEPA analysis is "inextricably related" to the analysis itself because "NPS's review under NEPA is an aspect of its decision on the merits." Opposition brief at 14. But, if NEPA review is itself precluded, as the Hale family contends, then there is no point to even considering the results of that analysis. Nowhere in their appeal at the District Court or Ninth Circuit level have the Hales based their challenge on the content of the environmental review as opposed to the very existence of that review. The Ninth Circuit quite properly found that it had jurisdiction to review the merits of the Petitioners' claims.

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[9] *See* App. A at A-5 to A-9.

[10] It appears that the government is raising this argument only with respect to Petitioners' claims under ANILCA, not its claims under R.S. 2477 and the problem of the appellate court's having reached independent factual conclusions.

[11] *See* App. A at A-7.

[12] *Id.*

## CONCLUSION

For the reasons in their Petition and above, Petitioners respectfully request that their Petition for Writ of Certiorari be GRANTED.

DATED: November, 2007.

Respectfully submitted,

JAMES S. BURLING
*Counsel of Record*
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

*Counsel for Petitioners*

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No. 06-1475

In The
# Supreme Court of the United States

JOSHUA HALE, JOSEPH HALE, and ELISHABA HALE,

*Petitioners,*

v.

DIRK KEMPTHORNE, Secretary, United States Department of Interior; WILL TIPTON, Acting Superintendent, Wrangell-St. Elias National Park & Preserve; MARSHALL NEECK, Chief Ranger, Wrangell-St. Elias National Park & Preserve; DEPARTMENT OF THE INTERIOR; NATIONAL PARK SERVICE; FRAN MAINELLA, Director National Park Service; MARCIA BLASZAK, Regional Director National Park Service, all in their official capacities; NATIONAL PARKS CONSERVATION ASSOCIATION; THE WILDERNESS SOCIETY; and ALASKA CENTER FOR THE ENVIRONMENT,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## *AMICUS CURIAE* BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

WILLIAM PERRY PENDLEY*
**Counsel of Record*
JOSHUA D. MCMAHON
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

*Attorneys for Amicus Curiae*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

*Amicus Curiae*, Mountain States Legal Foundation, will address the following question:

> Whether normal use and routine maintenance of a state-owned right-of-way is subject to federal approval and regulation?

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## *AMICUS CURIAE* BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Petitioners. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

## IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a nonprofit, membership, public interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state of the country. A majority of MSLF's members own property in the western states, *i.e.*, States with vast acreages of federal land.

Many of *Amicus*'s members own property interests that were granted under various federal land grants. Many of these members either actually settled the land that they own or are direct descendants of the original settlers. A significant number of these members own rights-of-way established pursuant to Sections 8 and 9 of the Mining Act of 1866, the Act of March 3, 1875, and the Irrigation or General Right of Way Act of 1891.

The Ninth Circuit's decision has disrupted the settled expectations of MSLF's members and will cause these members severe hardship with respect to the use and

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[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

enjoyment of their rights-of-way. Under the Ninth Circuit's decision, many of these members may no longer be able to enjoy their rights-of-way without significant federal government intrusion. Other MSLF members may be denied the ability to exercise their rights-of-way completely. If the Ninth Circuit's decision remains unchecked, MSLF members may not be able to exercise their rights-of-way, may lose significant value to their rights-of-way, and may be forced from their lands even though these vested property rights were preserved statutorily. Because *amicus* has a significant interest in the issue in this case, it respectfully submits this brief in support of the Petition for *Writ of Certiorari*.

## STATEMENT OF THE CASE

In 2002, the Hale family purchased 410 acres of land near McCarthy, Alaska. Their property is surrounded completely by the Wrangell-St. Elias National Park and Preserve, which was created in 1980. *Hale v. Norton*, 476 F.3d 694, 696 (9th Cir. 2007). The Hales gain access to their property over what remains of the 13-mile McCarthy-Green Butte Road ("Road"). *Id.*

In the spring of 2003, the Hales' home burned down. *Id.* During the course of rebuilding their home, the Hales used a bulldozer to bring in supplies over the Road. *Id.* Shortly thereafter, the National Park Service ("NPS") posted a public notice that no motorized vehicles, except snow machines, could use the Road. *Id.* In July 2003, the Hales contacted the NPS Superintendent to request a permanent permit to traverse the Road with a D-4 or D-5 bulldozer and a 16-foot trailer. *Id.* The Superintendent responded, offering to assist the Hales in preparing the necessary applications for a right-of-way permit. *Id.*

Two months later, in September 2003, the Hales submitted an "emergency" application for a temporary permit, asserting that they needed to transfer supplies before "freeze up." *Id.* The NPS responded, by letter, requesting more information about the nature of the

emergency and the proposed use. *Id.* In particular, the letter articulated the NPS's concern that the Hales were planning to use a bulldozer over the Road before "freeze up." *Id.* The NPS noted that the common practice of inholders in the Park had been to use heavy equipment only in the winter months after the ground had frozen. *Id.* The frozen ground and snow cover, it asserted, would protect the earth from extensive damage. *Id.* Further, because the Hales' proposed use "[fell] outside of any environmental assessment previously undertaken by the Park," the Hales' permit request "[would] require[ ] a more extensive review under the National Environmental Policy Act ['NEPA']." *Id.*

Between September and October 2003, in a series of contacts, the NPS offered to prepare an Environmental Assessment ("EA") and make a decision in approximately nine weeks. *Id.* at 697. It also offered to waive the expense of conducting the EA. *Id.* In November 2003, the Hales initiated suit. Specifically, the Hales sought an injunction requiring the NPS to provide them "adequate and feasible" access to their property, as provided by the Alaska National Interest Lands Conservation Act. Further, they requested a declaratory judgment that the NPS was violating the Hales' right-of-way over the Road, a purported R.S. 2477 right-of-way, by requiring them to obtain a permit.

The District Court denied the Hales' requested relief and dismissed the case for lack of subject matter jurisdiction, No. 03-CV-357 (D. Alaska 2003). The Hales filed a timely appeal. On February 9, 2006, the Ninth Circuit affirmed the lower court's decision, *Hale v. Norton*, 437 F.3d 892 (9th Cir. 2006). The Hales petition for rehearing *en banc* was denied and the Ninth Circuit withdrew and superseded its prior opinion, *Hale v. Norton*, 461 F.3d 1092 (9th Cir. 2006). That opinion was also subsequently withdrawn and superseded by the opinion reported at *Hale v. Norton*, 476 F.3d 694 (9th Cir. 2007). In each opinion, the Ninth Circuit affirmed the lower court's

decision, holding that: (1) the court lacked jurisdiction to reach the merits of the case because the NPS had not issued a permit granting or denying the Hales' access; (2) the Hales' access to their property was subject to reasonable regulation under ANILCA; and, (3) the NPS could regulate the Hales' use of the Road even if the Road existed as a valid R.S. 2477 right-of-way. On May 9, 2007, the Hales filed their petition for *certiorari*.

## SUMMARY OF THE ARGUMENT

In analyzing the Hales' ability to use the 13-mile McCarthy-Green Butte Road, which is a R.S. 2477 right-of-way, within the Wrangell-St. Elias National Park and Preserve, the Ninth Circuit ruled:

> [E]ven if the Hales have a valid right-of-way over the MGB road – which we do not decide – the existence of that right-of-way would not shield them from reasonable regulation by the [National Park Service].

*Hale*, 476 F.3d at 699. This ruling abrogates R.S. 2477 rights-of-way on federal land in violation of the common law, the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701-1785, and the Alaska National Interest Lands Conservation Act of 1980 ("ANILCA"), 16 U.S.C. §§ 3101-3233.

R.S. 2477 rights-of-way are easements. As an easement, R.S. 2477 rights-of-way are afforded the same protections given easements under the common law that is, they are property rights protected by the Fifth Amendment, which confer valuable rights upon the owner. In addition to this protection, R.S. 2477 rights-of-way are also protected by federal statutes; therefore, federal regulatory authority over these property rights is limited.

Taken to its logical conclusion, the decision of Ninth Circuit also impermissibly allows an extension of federal regulatory authority over thousands of other property rights, including, *inter alia*, easements granted pursuant

to: Section 9 of the Mining Act of 1866, the Act of March 3, 1875, and the Irrigation or General Right-Of-Way Act of 1891. This Court should grant *certiorari* to reverse the Ninth Circuit's ruling because it is in direct conflict with existing common law and federal statutes, is overly broad, and is of great national significance, especially to the thousands of rights-of-way holders affected by the Ninth Circuit's decision.

## ARGUMENT IN SUPPORT OF THE PETITION

### I. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE NINTH CIRCUIT'S DECISION ABROGATES R.S. 2477 RIGHTS-OF-WAY.

#### A. R.S. 2477 Rights-Of-Way Are Property Rights.

##### 1. Rights conferred pursuant to R.S. 2477.

Property is created and its dimensions defined by existing state, federal, and common law. One law creating rights in property was "An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for Other Purposes," 14 Stat. 253 July 26, 1866 ("Mining Act of 1866").

Section 8 of the Mining Act of 1866, later designated as Revised Statute 2477, grants rights-of-way over public lands for the construction of roads: "The right of way for the construction of highways over public lands, not reserved for public uses is hereby granted." Mining Act of 1866 § 8 ("R.S. 2477"). R.S. 2477 remained in effect until its repeal by FLPMA, which though substituting a complex procedure for future rights-of-way on public lands, 43 U.S.C. §§ 1761-1771, preserved rights-of-way that had vested under R.S. 2477 prior to 1976. FLPMA §§ 701(a), (h), 43 U.S.C. § 1701, note; 43 U.S.C. § 1769(a). Management and administration of federal lands are thus limited by the existence of these grandfathered rights. *See Sierra Club v. Hodel*, 848 F.2d 1068, 1083 (10th Cir. 1988), *aff'd after remand sub nom., Sierra Club v. Lujan*, 949 F.2d 362

(10th Cir. 1991), *rev'd on other grounds*, *Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

During the period that the R.S. 2477 grant was open – from 1866 to 1976 – the law was well-settled; that body of law assured rights-of-way holders complying with state law that their title was secure. The title conferred to the holder of a R.S. 2477 right-of-way is not fee title, rather it is an easement. *See Hodel*, 848 F.2d at 1083 ("Rights-of-way are a species of easement. . . ."). Easements are property rights protected under the Fifth Amendment: they cannot be taken without just compensation. *United States v. Welch*, 217 U.S. 333, 339 (1910); *see Block v. North Dakota*, 461 U.S. 273, 291 (1983) (explaining that a statute "depriving a State of land vested in it by the Constitution" would constitute a taking of the State's property without just compensation in violation of the Fifth Amendment). The holder of a R.S. 2477 easement has the right to use and maintain the easement. *See Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 748-749 (10th Cir. 2005) (defining scope of R.S. 2477 right-of-way) (hereinafter "*SUWA*"). These common law easement rights are in addition to the protections federal statutes afford R.S. 2477 easements. Similarly, because these are property rights protected by the common law and the Fifth Amendment, federal regulatory authority is limited.

### 2. R.S. 2477 rights-of-way are valid existing rights and cannot be diminished.

Title II of ANILCA created new and expanded existing national parks in Alaska, including the Wrangell-St. Elias National Park and Preserve, and placed the NPS in charge of the administration of those parks. 16 U.S.C. §§ 410h, 410hh(9). However, regulation of these new and expanded national parks is "*subject to valid existing rights.*" *Id.* § 410hh-2 (emphasis added). ANILCA could not be clearer

– the NPS cannot regulate in a way that invades or destroys "valid existing rights."

The phrase "valid existing rights" is a term-of-art and has been used hundreds of times in public land law. *See* Barkley and Albert, *A Survey of Case Law Interpreting "Valid Existing Rights" – Implications for Unpatented Mining Claims*, 34 Rocky Mt. Min. L. Inst. 9-1 (1988) (documenting the usage of the phrase "valid existing rights" in public lands statutes). By using this phrase, Congress understood that it had a general meaning. Furthermore, by choosing this phrase, instead of a different savings provision, Congress understood it was including within its scope even more interests than just vested rights. *See* Solicitor's Opinion M-36910 (Supp.) 88 I.D. 909 (Oct. 5, 1981) (interpreting "valid existing rights" as including more than "vested rights").

The term "valid existing rights" generally "refers to property rights, most of which are created by state law, protecting them from invasion or disparagement by the [federal government]." *Stupak-Thrall v. United States*, 89 F.3d 1269, 1285 (6th Cir. 1996) (*en banc*) (7-7 decision) (Boggs, J., dissenting). For a property interest to be protected as a "valid existing right" under ANILCA it must meet three conditions: (1) it must be a "right"; (2) it must be a right "existing" at the time of ANILCA's effective date; and (3) it must be an existing right that is "valid" under laws applicable to the right prior to ANILCA's effective date. A "right" is "an interest or title in an object of property; a just and legal claim to hold, use, or enjoy it, or to convey or donate it, as he may please." *Id.* at 1325. Congress established that title to property could be obtained over a right-of-way through the enactment of R.S. 2477. The word "existing" limits those rights protected from invasion by NPS regulations to those rights that predate

the enactment of ANILCA.[2] "Valid" means "legally sufficient or efficacious; authorized by law." Black's Law Dictionary 1550 (6th ed. 1990). Perfected R.S. 2477 rights-of-way are vested property rights. Federal courts interpret R.S. 2477 as a present grant of a right-of-way, the construction of which withdraws the land from the public domain. For example, in *United States v. 9,947.41 Acres of Land*, the district court held that a road constructed pursuant to R.S. 2477 was a property right such that:

> Title of the United States to the right-of-way passed from the United States . . . and ceased to be a portion of the public domain without any further action . . . [and] that, any subsequent disposition of the fee title of the land over which it passed was subject to such right-of-way.

220 F.Supp. 328, 335 (D.Nev. 1963). This R.S. 2477 property right requires the government to compensate the owner if the right is taken, and limits the ability of the government to manage the lands subject to the right-of-way. *See Block*, 461 U.S. at 291.

ANILCA's savings provision provides that "*Subject to* valid existing rights, the Secretary shall administer the lands . . . " 16 U.S.C. § 410hh-2 (emphasis added). The meaning of "subject to" is highly definite, that is, "subordinate" and "subservient." *Black's Law Dictionary* 1425 (6th ed. 1990). If the regulatory powers delegated to the NPS are sufficient to destroy certain rights-of-way in their entirety, it should be obvious that those regulatory powers are not limited by, let alone made "subordinate" or "subservient" to, those state-created rights. *See Stupak-Thrall*, 89 F.3d at 1285. Fulfilling the "subject to" condition

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[2] In this case, the Ninth Circuit did not address the existence or scope of the access right; it was assumed. *Hale*, 476 F.3d at 699 ("Consequently, even if the Hales have a valid right-of-way over the MGB road – *which we do not decide* – the existence of that right-of-way would not shield them from reasonable regulation by the NPS.") (emphasis added).

requires that the protected "valid existing rights" not be destroyed or disparaged by NPS regulation. *Id.*

To summarize, the plain and unambiguous meaning of "valid existing rights" in Title II of ANILCA protects from invasion or disparagement: (1) property rights (2) officially sanctioned by law (3) in existence on the date ANILCA was enacted. The Ninth Circuit never determined whether or not a property right was at stake; instead, that fact was inappropriately assumed. *Hale*, 476 F.3d at 699. Additionally, and contrary to law, the Ninth Circuit made the assumed property right subservient to federal regulatory authority when it ruled, "[c]onsequently, even if the Hales have a valid right-of-way over the MGB road – which we do not decide – the existence of that right-of-way would not shield them from reasonable regulation by the NPS." *Id.* Assuming the Hales have a valid R.S. 2477 right-of-way over the Road, then that land is withdrawn from the public domain. The federal government may not invade or disparage this right-of-way. However, this is exactly what the Ninth Circuit's ruling has done. The Ninth Circuit's ruling unlawfully allows federal regulation of rights-of-way on federal land exceeding the NPS's grant of limited authority under ANILCA. This Court should grant *certiorari* and reverse this decision.

### B. R.S. 2477 Rights-Of-Way Are Property Interests Protected by The Common Law.

The Tenth Circuit, in *Sierra Club v. Hodel*, relied upon the common law of dominant and servient estates in its analysis of R.S. 2477 rights-of-way. That case, known as the Burr Trail case, dealt with the challenged expansion of an established R.S. 2477 right-of-way in Garfield County, Utah. The Burr Trail hosted a variety of uses from the late 1800s to the present, including mineral exploration, economic development, and tourism. *Hodel*, 848 F.2d at 1072. The combination of growing uses and county maintenance had created a R.S. 2477 right-of-way in favor of Garfield County. *Id.* The *Hodel* court held: "Rights-of-way

are a species of easement and are subject to the principles that govern the scope of easements." *Id.* at 1083. Therefore, the federal government, as servient estate holder, may not unreasonably interfere with the dominant estate holder's use of that easement. Restatement (Third) of Property (Servitudes) § 1.2.

While the rights of the dominant and servient estate do not change, the use of the easement may. In fact, "[t]he manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude." *Id.* § 4.10. This is an important benefit for all easements, including R.S. 2477 rights-of-way, as evidenced by the Burr Trail in Garfield County, Utah. For that road to be traveled safely by the increasing number of users, changes to the easement had to be made. However, while the servient estate holder has certain rights pertaining to the use of an easement, a servient estate owner may not preemptively restrict a dominant estate owner's use of an easement as provided by the ruling of the Ninth Circuit. The Restatement (Third) of Property notes:

> [T]he holder of an easement . . . is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. . . . Unless authorized by the terms of the servitude, the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.

*Id.*

Accordingly, if the dominant estate holder's use of the easement overly burdens the federal government's servient estate, the federal government is entitled to pursue remedies available through property and tort law, including injunctive relief and damages; however, the federal government may not preemptively restrict the dominant estate holder's use. This is precisely what the Ninth Circuit has ruled may happen. The Ninth Circuit has

ruled that the federal government, the servient estate holder, may preemptively restrict the Hales' use of their easement. This ruling is contrary to well established property law. The Hales merely wish to maintain their easement for safe passage to their inholding; a legal use, well within the rights of a dominant estate holder. In the event this use of the easement by the dominant estate holder unlawfully interferes with the servient estate, the exclusive remedy is to seek injunctive relief and damages, as every other servient estate holder is required to do. The servient estate holder, even where it is the federal government, may not preemptively restrict the dominant estate holder's use of the easement. This Court should grant *certiorari* to reverse this ruling by the Ninth Circuit.

## II. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE NINTH CIRCUIT'S DECISION ELIMINATES THE SAVINGS PROVISIONS IN FLPMA AND ANILCA.

### A. The Ninth Circuit's Ruling Eliminates The Savings Provisions in FLPMA.

Federal regulatory authority over public lands is provided in FLPMA. Passed in 1976, FLPMA's purpose was to replace numerous laws and provide the Bureau of Land Management ("BLM") with a framework for managing its lands. 43 U.S.C. §§ 1701-1785. With FLPMA's passage, Congress declared a new policy of retention and conservation of public lands in federal ownership. 43 U.S.C. § 1701(1), (8). FLPMA directed the Secretary of the Interior to administer federal lands for multiple uses and to regulate uses to prevent "unnecessary and undue degradation of the lands." *Id.* §§ 1712(c), 1732(a), (b).

In order to manage rights-of-way on federal lands, FLPMA created a permitting procedure authorizing the Secretary of Interior to issue limited rights-of-way. *Id.* §§ 1761-1771. However, while this replaced the *in præsenti* grant provided by R.S. 2477, FLPMA Section 701(a)

expressly preserved all R.S. 2477 rights-of-way established prior to its enactment. 43 U.S.C. § 1701, note. This savings provision provides:

> [n]othing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act.

*Id.*; *see also* FLPMA § 701(h), 43 U.S.C. § 1701, note, ("All actions by the Secretary concerned under this Act shall be subject to valid existing rights."); *see also* 43 U.S.C. § 1769(a) ("Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted.").

"Where a saving clause is appended to an act that expressly or impliedly repeals another enactment, the law repealed is continued in force as to existing rights and pending actions in accord with the terms of the saving clause." 1A Sutherland Statutory Construction (6th ed.) § 23:40. This Court has an established history of giving effect to saving clauses. *See Great Northern Ry. Co. v. United States*, 208 U.S. 452 (1908); *Hertz v. Woodman*, 218 U.S. 205 (1910); *Timken Roller Bearing Co. v. Pennsylvania R. Co.*, 274 U.S. 181 (1927); *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306 (1930). FLPMA expressly repealed R.S. 2477, but R.S. 2477 continued in force as to existing rights. FLPMA § 701(a), 43 U.S.C. § 1701, note. The language Congress chose could not be clearer, all rights-of-way shall not be terminated; R.S. 2477 rights-of-way established prior to October 21, 1976, shall remain in effect. Therefore, this savings provision must be given its full effect: all rights-of-way established prior to October 21, 1976, must be protected. These rights-of-way cannot be eliminated through the use of federal regulatory authority as the Ninth Circuit's ruling in *Hale* allows. *Hale*, 476 F.3d at 699. This Court should grant *certiorari* and reverse the Ninth Circuit's ruling.

### B. The Ninth Circuit's Ruling Eliminates The Savings Provisions in ANILCA.

Because a R.S. 2477 right-of-way is a vested property right, Federal regulatory authority is limited. ANILCA explicitly honors and protects valid existing rights: it is clear that the regulatory authority of the NPS is limited by those rights. The Wrangell-St. Elias National Park and Preserve was established pursuant to Title II of ANILCA. 16 U.S.C. § 410hh(9). Title II contains a specific savings provision applying to ANILCA's newly created national parks and preserves and provides:

> *Subject to valid existing rights*, the Secretary shall administer the lands, waters, and interests therein added to existing areas or established by the foregoing sections of this title as new areas of the National Park System . . . .

*Id.* § 410hh-2 (emphasis added).

Additionally, Title XI of ANILCA provides for transportation in and across, and access into national parks and preserves in Alaska. *Id.* § 3161-3173. In enacting Title XI, Congress found that "Alaska's transportation and utility network is largely undeveloped and the future needs for transportation and utility systems in Alaska would best be identified and provided for through an orderly, continuous decisionmaking process involving the State and Federal Governments and the public." *Id.* § 3161. Within this statutorily created system of creating and managing transportation systems into and within the newly created and expanded national parks and preserves, Congress again included a savings provision protecting valid existing rights, providing, "Nothing in this title shall be construed to adversely affect any *valid existing right of access*." *Id.* § 3169 (emphasis added).

The language Congress chose could not be clearer, "*Nothing* in this title shall be construed to *adversely affect any valid existing right of access*." *Id.* § 3169 (emphasis

added). The Ninth Circuit's ruling eliminates this Congressional mandate. An individual cannot own a right if he must request permission prior to exercising that right. However, this is precisely the ruling of the Ninth Circuit in *Hale* and it adversely affects the Hales' R.S. 2477 right-of-way, their valid existing right of access. If the regulatory powers delegated to the NPS are sufficient to destroy rights-of-way, it should be obvious that those regulatory powers are not limited by, let alone made "subject to" those rights. *See Stupak-Thrall*, 89 F.3d at 1285. Fulfilling the "subject to" condition requires that the protected rights-of-way not be destroyed or disparaged by NPS regulation. *Id.* This Court should grant *certiorari* and reverse the Ninth Circuit's holding.

## III. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE RULING OF THE NINTH CIRCUIT HAS NATIONAL SIGNIFICANCE.[3]

### A. The Ninth Circuit's Ruling Affects Thousands of R.S. 2477 Rights-Of-Way.

R.S. 2477 was enacted to promote the congressional policy of westward expansion and development. *See SUWA*, 425 F.3d at 740-741. This *in præsenti* grant remained in effect until repeal by FLPMA in 1976 and was the authority for the creation of most of the roads in the western United States. *Id.* at 740. By 1976, thousands of R.S. 2477 rights-of-way existed. *See United States Department of the Interior Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Rights-of-Way*

[3] A creative Justice Department attorney could make an argument that the Ninth Circuit's ruling grants broad federal regulatory authority over fee title, including title owned pursuant to: Homestead Act of 1862, ch. 75, 12 Stat. 392 (1862), repealed by Act of Oct. 21, 1976, Pub. L. No. 94-579, 90 Stat. 2787 (1976), The Desert Lands Act of 1877, ch. 107, 19 Stat. 377 (codified at 43 U.S.C. §§ 321-323), and the Preemption Act of Sept. 4, 1841, ch. 16, 5 Stat. 453 (repealed 1891).

*Claims on Federal and Other Lands* (June 1, 1993). In fact, it is impossible to determine the total number of grants because establishing a R.S. 2477 right-of-way required neither application nor action from state or federal government. *See, e.g.*, 43 C.F.R. § 2822.1-1 (1973). Furthermore, establishing R.S. 2477 rights-of-way required no administrative procedure: "no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested." *SUWA*, 425 F.3d at 741. Thus, "R.S. 2477 highways were constructed without any approval from the federal government and with no documentation of the public land records, so there are few official records documenting the right-of-way or indicating that a highway was constructed on federal land under this authority." *Id.* (internal citations omitted.)

Once a R.S. 2477 right-of-way is created, neither that right nor its scope may be diminished. While FLPMA authorizes the exchange of a R.S. 2477 right-of-way for a FLPMA right-of-way, such an exchange is not mandatory and FLPMA explicitly requires the consent of the holder of such right-of-way prior to such an exchange. 43 U.S.C. § 1769(a). This provision makes it clear that the government may not require the holder to give up a R.S. 2477 right-of-way. Thus, if a holder established a right-of-way prior to the passage of FLPMA, FLPMA requires the government to honor the right and its scope of that right-of-way. Given the applicability of the Ninth Circuit's decision to thousands of R.S. 2477 rights-of-way, this Court should grant *certiorari* due to the national significance of the question presented.

### B. The Ninth Circuit's Ruling Affects Rights-Of-Way Pursuant to Section 9 of The Mining Act of 1866.

Similar to R.S. 2477's grant of a right-of-way over public lands for the construction of highways, Section 9 of

the Mining Act of 1866 grants rights-of-way over public lands for the construction of irrigation ditches. Section 9 provides:

> That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed.

Mining Act of 1866 § 9, 14 Stat. at 253. This provision, like R.S. 2477 was repealed by FLPMA. The FLPMA repeal of Section 9, however, was also made subject to valid existing rights. FLPMA §§ 701(a), (h), 43 U.S.C. § 1701, note; 43 U.S.C. § 1769(a).

Additionally, and again similar to R.S. 2477, "the extent of the right of way in point of width or area was not stated, and the grant was noticeably free from conditions. No application to an administrative officer was contemplated, no consent or approval by such an officer was required, and no direction was given for noting the right of way upon any record." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917).

The broad ruling found within the Ninth Circuit's decision in *Hale* impermissibly allows federal regulatory authority over these vested property rights. The Ninth Circuit ruled, "even if the Hales have a valid right-of-way . . . that right-of-way would not shield them from reasonable regulation by the NPS." *Hale*, 476 F.3d at 699. Given FLPMA's and ANILCA's preservation of valid existing rights, this ruling cannot stand. Just as R.S. 2477 rights-of-way are easements and are afforded the protections easements are entitled, Section 9 rights-of-way must also

be protected. When the dominant estate holder's use of the easement overly burdens the federal government's servient estate, then, and only then, is the federal government entitled to pursue remedies available through property and tort law, including injunctive relief and damages. The federal government may not preemptively restrict the dominant estate holder's use through impermissible regulatory authority as the Ninth Circuit's ruling allows.

### C. The Ninth Circuit's Ruling Affects Rights-Of-Way Pursuant to The Act of March 3, 1875 and The Irrigation or General Right-Of-Way Act of 1891.

The Ninth Circuit's ruling also adversely impacts rights-of-way pursuant to both the Act of March 3, 1875 ("1875 Act") and the Irrigation or General Right of Way Act of 1891 ("1891 Act").

The 1875 Act, provides rights-of-way for railroad companies. The Act of Mar. 3, 1875, c. 152, § 4, 18 Stat. 483. The 1875 Act provides:

> Any railroad company desiring to secure the benefits of section 934 to 939 of this title, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the officer, as the Secretary of the Interior may designate, of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, that if any section of said road shall not be completed within five

> years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

43 U.S.C. § 937. The Department of Interior explained that the 1875 Act "is in terms like" the 1891 Act and construed the two Acts similarly. *DeWeese v. Henry Investment Company*, 39 Pub. Lands Dec. 27, 32 (1910). This interpretation was adopted by both the Supreme Court of New Mexico and the United States District Court for the District of Montana. *United States v. Lee*, 110 P. 607 (N.M. 1910); *Roth v. United States*, 326 F.Supp.2d 1163 (D.Mont. 2003).

The 1891 Act provided for rights-of-way through public and reserved lands for irrigation purposes. 1891 Act, c. 561, § 18, 26 Stat. 1101. The 1891 Act provided:

> The right of way through the public lands and reservations of the United States is hereby granted to any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage . . . to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof, and upon presentation of satisfactory showing by the applicant, such additional rights of way as the Secretary of the Interior may deem necessary for the proper operation and maintenance of said reservoirs, canals, and laterals. . . . Provided, that no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation . . . .

43 U.S.C. § 946. The Act further explained the mechanism by which a canal or ditch company could avail itself of benefits under the Act, providing:

> Any canal or ditch company desiring to secure benefits of sections 946 to 949 of this title shall,

> within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the officer, as the Secretary of the Interior may designate, of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of or subject to such right of way.

*Id.* § 947. "Section 946 does not confer any rights independently of Section 947, and the two statutory provisions 'are to be construed together.'" *Roth v. United States*, 326 F.Supp.2d 1163, 1169 (D.Mont. 2003) (quoting *Union Land & Stock Co. v. United States*, 257 F. 635, 639 (9th Cir. 1919)). "Section 948 broadened the scope of the Act, making it applicable 'to all canals, ditches, or reservoirs . . . whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps therein provided for.'" *Id.* (quoting 43 U.S.C. § 948). Similar to R.S. 2477 and Section 9 of the 1866 Mining Act, FLPMA repealed the 1891 Act but contained a savings provision preserving rights obtained under the 1891 Act prior to October 21, 1976. FLPMA §§ 701(a), (h), 43 U.S.C. § 1701, note; 43 U.S.C. § 1769(a).

Although rights-of-way pursuant to the Act of 1875 and the Act of 1891 were not directly at issue in *Hale*, the ruling is broad enough to burden them as well; the Ninth Circuit only referred to "rights-of-way" generally. Rights-of-way pursuant to the Act of 1891 and the Act of 1875 are no less important than rights-of-way established pursuant to the Mining Act of 1866. All of these rights-of-way are vested property rights; they are easements to be afforded the full protection of the law. Moreover, where the federal government is the servient estate holder, it may not use

regulations to preempt the easement holder from exceeding the scope of the easement. Preemptive regulation is unprecedented in the law of easements, but is exactly what is sanctioned by the ruling of the Ninth Circuit in *Hale*. *Hale*, 476 F.3d 694, 699. This ruling is wrong and flies in the face of well-established property law. The sole, exclusive remedy of the servient estate holder, even when that servient estate holder is the United States, is to seek injunctive relief and damages such as is the remedy for every other servient estate holder.

## CONCLUSION

For the foregoing reasons, *Amicus Curiae*, Mountain States Legal Foundation respectfully requests that this Court grant the Petition for *Certiorari* in order to determine whether normal use and routine maintenance of a state-owned right-of-way is subject to federal approval and regulation.

Respectfully submitted,

WILLIAM PERRY PENDLEY*
**Counsel of Record*
JOSHUA D. MCMAHON
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

*Attorneys for Amicus Curiae*

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